S. HRG. 101-514

RELIGIOUS FREEDOM ACT AMENDMENTS

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 1124

TO PROVIDE A MEANS TO ENSURE THAT THE MANAGEMENT OF FEDERAL LANDS DOES NOT UNDERMINE AND FRUSTRATE TRADITIONAL NATIVE AMERICAN RELIGIOUS PRACTICES

SEPTEMBER 28, 1989
WASHINGTON, DC

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RELIGIOUS FREEDOM ACT AMENDMENTS OF 1989

THURSDAY, SEPTEMBER 28, 1989

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 1:55 p.m., in room 485, Russell Senate Office Building, Hon. John McCain (vice chairman of the committee) presiding.

Present: Senators McCain, Daschle, and Gorton.

Staff present: Eric Eberhard, Dan Lewis, Steve Heeley, Alan Parker, Patricia Zell, Lurline McGregor, Bob Arnold, Kathleen Hooker, Roy Atwood, Dale Lloyd, Don Cash, Sara Yager, and Hawley Manwarring.

STATEMENT OF HON. JOHN McCAIN, U.S. SENATOR FROM ARIZONA, VICE CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

Senator MCCAIN. As a dramatic departure from our usual procedure, this hearing will start early today. I would like to welcome all the witnesses here today to testify on S. 1124, the American Indian Religious Freedom Act Amendments of 1989, especially my friends from Arizona, Chairman Haskie and Chairman Sidney.

I originally introduced S. 1124 for discussion purposes in order to provoke serious thought and discussion on these issues. It is a very complicated area of law which provokes strong, deeply-held views. It is my hope that S. 1124 will help to spark a genuine consensus on the changes that are necessary to make the American Indian Religious Freedom Act into an effective law.

In 1978 the Congress enacted the American Indian Religious Freedom Act. It commits the United States to the protection of religious freedom for American Indians. The act required the President to direct Federal agencies to evaluate their policies and practices, in consultation with native traditional religious leaders, in order to determine appropriate changes necessary to protect and preserve Native American cultural rights and practices.

In the years since 1978 the Federal courts have been called upon on numerous occasions to determine whether the land management decisions of Federal agencies have been contrary to the provisions of AIRFA. Unfortunately, the vague provisions of AIRFA have led to a great deal of confusion regarding the interpretation and implementation of the act. In *Lyng* v. *Northwest Indian Cemetery Protective Association,* the Supreme Court was faced with a case involving plans to permit logging on Forest Service lands in an area which was regarded as sacred by traditional Indian religious practitioners. The Indians claimed that preservation of the area in its pristine condition was essential for their religious practices.

In their decision, the Supreme Court acknowledged that the logging in the area could devastate or destroy the traditional Indian religious practices. Despite this finding, the Supreme Court decided the case in favor of the Forest Service, noting that the Forest Service had taken some steps to mitigate the harm to native religious practices. This decision has stirred enormous controversy among Native Americans, Federal officials, and other parties.

S. 1124 is an attempt to strike a balance among many of the competing interests involved in Federal land management decisions. Under S. 1124, Federal lands which have been considered sacred and indispensable to a Native American religion which are necessary to the conduct of that religion are entitled to protection. These lands should not be managed in a way that will pose a "substantial and realistic threat of undermining and frustrating" the Native American religion or religious practice.

Under the bill, Federal officials are granted latitude to act to carry out legal responsibilities of the Federal Government; to protect a compelling governmental interest; or to protect a vested property right. These land management officials shall, to the greatest extent feasible, select a course of action that is the least intrusive on traditional Native American religions or religious practices.

Nothing in this bill compels a Federal official to totally deny public access to Federal lands. The bill establishes explicit burdens of proof for all parties in any judicial challenge to a Federal land management decision. Petitioners in such cases will need to prove that the Federal decision poses a substantial and realistic threat of undermining and frustrating a traditional Native American religion or religious practice. If this burden of proof is met, the Federal agency must show that its decision was necessitated by law to protect a compelling governmental interest or to protect a vested property right. In all cases, the agency must prove that their decision reflects a course of action which is the least intrusive on the traditional Native American religion or religious practice. The Federal courts would have the authority to enter any order necessary to carry out the purposes of the bill.

It is my hope that this bill retains the spirit and intent of AIRFA and provides the necessary guidance for the resolution of the conflicts between the concepts inherent in Indian and native cultures, and Federal land management practices. This balance of competing interests must be fully informed by the Constitution, our moral and legal obligations to Native Americans, and the legitimate interest of the Federal Government in the sound management of Federal lands for the benefit of all Americans. It is incumbent upon us to ensure that those who occupied the lands of our Nation before us be ensured of their religious freedom.

I look forward to the testimony we will hear today in the hopes that we will be able to find that common ground which will accommodate the seemingly incompatible views of all affected parties.

[Text of S. 1124 follows:]

II

101st CONGRESS
1st Session

S. 1124

To provide a means to ensure that the management of Federal lands does not undermine and frustrate traditional Native American religious practices.

IN THE SENATE OF THE UNITED STATES

June 6 (legislative day, January 3), 1989

Mr. McCain introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

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A BILL

To provide a means to ensure that the management of Federal lands does not undermine and frustrate traditional Native American religious practices.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. This Act may be cited as the "American Indian Religious Freedom Act Amendments of 1989".

SEC. 2. The Congress finds that—

(1) unlike any other established religion, many traditional Native American religions are site-specific in that the Native American religions hold certain lands or natural formations to be sacred;

(2) such sacred sites are an integral and vital part of the Native American religions and the religious practices associated with such religions;

(3) many of these sacred sites are found on lands which were formerly part of the aboriginal territory of the Indians but which now are held by the Federal Government; and

(4) lack of sensitivity or understanding of traditional Native American religions on the part of Federal agencies vested with the management of Federal lands has resulted in the lack of a coherent policy for the management of sacred sites found on Federal lands and has also resulted in the infringement of religious freedom for Native Americans.

SEC. 3. Public Law 95-341 (42 U.S.C. 1996), popularly known as the American Indian Religious Freedom Act, is amended by adding at the end thereof the following new section:

"SEC. 3. (a) Except as otherwise provided in this section, Federal lands that—

"(1) have historically been considered sacred and indispensable by a traditional Native American religion, and

"(2) are necessary to the conduct of a Native American religious practice, shall not be managed in a manner that will pose a substantial and realistic threat of undermining and frustrating such religion or religious practice.

"(b)(1) Subsection (a) shall not apply to management decisions which are necessary to—

"(A) carry out the legal responsibilities of the Federal Government,

"(B) protect a compelling governmental interest, or

"(C) protect a vested property right.

"(2) In making management decisions described in paragraph (1), the Federal agency shall attempt to accommodate the various competing interests and shall, to the greatest extent feasible, select the course of action that is the least intrusive on traditional Native American religions or religious practices.

"(3) Nothing in this section shall be interpreted as requiring any Federal agency to totally deny public access to Federal lands.

"(c)(1) The United States district courts shall have jurisdiction over any civil action brought by any person to enforce the provisions of this section and may issue such orders as may be necessary to enforce the provisions of this section.

"(2) Any person challenging a decision of a Federal agency in a civil action brought under this subsection shall have the burden of proving that the decision of the Federal agency will pose a substantial and realistic threat of undermining and frustrating a traditional Native American religion or religious practice. If such threat is established, the Federal agency shall have the burden of demonstrating that the Federal agency's decision is based on one or more of the criteria in subsection (b)(1). If the Federal agency's decision is found to have been based on one or more of the criteria in subsection (b)(1), then the Federal agency shall have the burden of proving that it selected the course of action that is the least intrusive on the Native American religion or religious practice."

○

Senator McCain. I would like to call as our first two witnesses Mr. Jerry Rogers, Associate Director of Cultural Resources, National Park Service, and Mr. Allan J. West, Deputy Chief of the Forest Service. Mr. West will be accompanied by Mr. Robert Tippeconnic, Tribal Government Program Manager, Forest Service, U.S. Department of Agriculture.

Welcome, gentlemen. You are free, of course, to summarize your statements if you so choose. Your complete statements will be made a part of the record. Thank you for appearing before us today. Please proceed.

Mr. Rogers, would you care to go first?

STATEMENT OF JERRY ROGERS, ASSOCIATE DIRECTOR FOR CULTURAL RESOURCES, NATIONAL PARK SERVICE, U.S. DEPARTMENT OF THE INTERIOR

Mr. Rogers. Mr. Chairman, let me first say that the National Park Service is extremely grateful for being invited to participate by the Select Committee on dealing with a very, very important issue, one about which we care very much.

My statement is extremely concise. If it doesn't tax your patience, I think it might be best if I do read most of it.

Senator McCain. Before you proceed, could I make note that the distinguished chairman of the committee, Senator Inouye, is on the floor as the manager of the Department of Defense appropriations bill, which is being considered by the full Senate. That is why he is not here today. He has a very deep interest in this issue.

Please proceed, sir.

Mr. Rogers. Thank you, sir.

The National Park Service respects Native American rights to exercise their religions, and we support the concept of managing Federal lands in a manner that poses no substantial threats to religions of Native Americans who are traditionally associated with those lands.

Consultations with Native Americans are required to determine whether threats exist and, if so, how mutually agreeable mitigation measures can be negotiated.

The Department of the Interior has instituted measures to meet the intent of the American Indian Religious Freedom Act. While some measures are still not as mutually satisfying as we would wish, the Department has consciously worked to respect the spiritual ties that bind certain Native American communities to sacred cultural and natural resources. Indeed, these concerns led the National Park Service to make it a matter of policy that resources traditionally associated with Native Americans would be managed without impeding customary religious practices. These policies make S. 1124 unnecessary for the National Park Service.

Quite aside from the compliance requirements of preservation and environmental law, the National Park Service's management policies commit the Service to protecting sacred resources to the extent practicable and in a manner consistent with the goals of the traditionally-associated Native American tribe or group. National Park Service policy further directs our land managers to be as unrestrictive as possible in permitting Native American access to and use of traditional sacred resources for customary ceremonials. Responsiveness to Native Americans' concern for the continued integrity of their religious systems is as important, we believe, as protection for the integrity of the cultural and natural resource base of the parks themselves.

Our policies also call for the Service to collaborate with Native Americans to develop a confidential data base that can alert park managers to the presence of traditional resources with religious significance to the contemporary group. We call these "ethnographic resources." We believe a data base of ethnographic resources is an essential first step toward the formulation of non-intrusive Federal actions because it will first alert Federal managers to the presence of sacred resources, and signal the need to consult Native Americans before any actions are undertaken; and, second, it facilitates the listing of sacred resources on the national registers maintained by the National Park Service, specifically the National Register of Historic Places and the National Historic and Natural Landmark Lists. These designations afford traditional protection against potentially adverse actions.

To implement this policy goal, funds will be programmed to develop such a data base as budgetary priorities permit. We believe that this emphasis on culturally-informed action and consultation and negotiation in good faith is crucial to meeting our policy objectives and the intent of S. 1124.

Other Federal agencies also make concerted efforts to accommodate American Indian religious rights. For example, Bureau of Land Management regulations require coordination with and meaningful involvement of Indian tribes in the development of resource management plans. Indian tribes are given opportunities to review plans. They are notified of intention to amend the plans, and they are asked to suggest topics and issues. The BLM also engages in many other activities to respect the intent of the American Indian Religious Freedom Act. For these reasons, we believe the enactment of S. 1124 is unnecessary.

Mr. Chairman, I would be pleased to attempt to answer your questions.

[Prepared statement of Mr. Rogers appears in appendix.]

Senator McCain. Thank you very much.

Mr. West.

STATEMENT OF ALLAN J. WEST, DEPUTY CHIEF, FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE, ACCOMPANIED BY ROBERT TIPPECONNIC, TRIBAL GOVERNMENT PROGRAM MANAGER

Mr. West. Thank you, Mr. Chairman. Thank you for the opportunity to offer the Department of Agriculture's views on S. 1124.

With me today is Bob Tippeconnic, the Tribal Government Program Manager for the Forest Service.

The Department of Agriculture and the Forest Service support and appreciate the rights of Native Americans to exercise their religious beliefs and practices. Under current law we identify, protect, and manage all significant cultural resources on National Forest System lands, including Native American cultural resources. We are attempting to work with Native Americans to ensure that their concerns are addressed.

Since the passage of the 1976 National Forest Management Act, we have placed substantially more emphasis on coordination with Native Americans in order to understand their needs, concerns, and values. We coordinate regional and forest planning with Native Americans and notify those whose lands or treaty rights are expected to be affected by agency activities. We also consider the objectives that Native Americans express, and where conflicts are identified, we consider alternatives to resolve the conflicts.

Our land management planning process provides special consideration for Native Americans. Once a Native American interest receives protection in a land and resource management plan, all of our subsequent actions must be consistent with such protection.

Beyond these National Forest Management Planning Act requirements, other laws also ensure that Native Americans' concerns are considered in our decisions. The National Environmental Policy Act requires that affected Indian tribes be consulted. The National Historic Preservation Act requires protection of historic and cultural sites. The effects of management on these sites involve consultation with interested parties, including Native Americans.

Native Americans also receive special consideration under the Archaeological Resources Protection Act. We attempt to identify Native Americans having aboriginal or historic ties to National Forest System lands. We also attempt to locate and determine the significance of areas or specific sites of religious or cultural importance for future planning.

We are continuing to strengthen our methods of considering Native American issues in management of the Forest Service. In 1988, we established the Tribal Government Program Manager position here in our national office to address Native American issues and to work with individuals and groups within the tribal community. We are trying to increase employee sensitivity to and awareness of Native American issues. We are also trying to establish more mutual and beneficial partnerships with tribal governments. Our policy has four major objectives.

The first is to maintain a governmental relationship with Federally-recognized tribal governments;

Second, implement our programs and activities honoring Indian treaty rights;

Third, administer programs and activities to address and be sensitive to traditional Native American religious beliefs and practices; and

Fourth, provide research, transfer of technology, and technical assistance to tribal governments.

Our goal is to gain a better understanding and appreciation of cultural and religious beliefs and practices so that related issues are identified and properly acknowledged in Forest Service programs and activities.

In summary, we believe we have much common ground with Native Americans in the management of the National Forest System. As we implement our policy, we are meeting more with tribal groups and others to seek creative solutions to specific concerns and to find common ground.

While we support the basic philosophy underlying S. 1124, we have concerns. Terms such as "substantial and realistic threat of undermining and frustrating" and "compelling governmental interest" need further definition. In addition, agreement on which Federal lands have "historically been considered sacred and indispensable" or "are necessary to the conduct of a Native American religious practice" may, in certain cases, be impossible.

We are also concerned that section 3(c) could be interpreted to allow a case to be taken directly to the United States District Courts, thus effectively circumventing the existing administrative appeals process. Because of these concerns we cannot support the enactment of S. 1124.

That concludes my testimony. Mr. Tippeconnic and I would be happy to answer questions.

[Prepared statement of Mr. West appears in appendix.]

Senator McCAIN. I note presence of my distinguished colleague from Washington, Senator Gorton.

Do you have any statement you would like to make?

Senator GORTON. Not at this time.

Senator McCAIN. Thank you, both witnesses.

Starting with you, Mr. Rogers, do you feel that present law adequately protects the rights of Native Americans to observe their religious practices?

Mr. ROGERS. Mr. Chairman, we believe that it does insofar as National Park Service lands are concerned. We cannot make judgments beyond that, but we believe——

Senator McCAIN. Obviously, only applying to those areas under your supervision. That's your view, that there is no requirement for a change in the law?

Mr. ROGERS. We believe that National Park Service policy, executed as it is written, would be adequate to do that.

Senator McCAIN. What is your view, Mr. West?

Mr. WEST. We believe that it is adequate to respond within our policy at this time.

Senator McCAIN. Mr. Rogers, does it arouse any curiosity in you that Native Americans almost unanimously believe—or the ones that are directly affected by this law—believe that some changes need to be made?

Mr. ROGERS. Senator, it certainly does. I think I understand that feeling, and I think it reflects more nearly Federal agencies' needing the time and the ability to build programs to implement present law than it does a deficiency in present law.

Senator McCAIN. Mr. West, do you believe that your agency, the Forest Service, has exercised concern and consideration to Native Americans about the sacredness of various religious practices?

Mr. WEST. I would say that over time, we have not done the complete job we should have done. We have recently instituted a new policy, brought on board a Tribal Government Program Manager to look at that, and our belief is that with the changes we have made, we can meet the intent.

Senator McCAIN. Mr. Rogers, would you believe that it might be appropriate to have one standard throughout the bureaucracy—the Park Service, the Forest Service, BLM, etc.? Would that be helpful?

Mr. ROGERS. In my opinion, Mr. Chairman, that not only would be helpful, but that will become the situation. One of the duties of the Secretary of the Interior is to provide coordination for the entire Executive Branch on matters dealing with cultural resources. We view ethnographic resources as falling within that definition.

Senator MCCAIN. Well, Mr. Rogers, we are nearing the end of the year 1989. We have been dealing with this issue for several years. I wonder if you would anticipate when that might come about?

Mr. ROGERS. I wish I could give you a date certain. I think it depends on the vagaries and the difficulties of budgeting, which are certainly not easy questions for anyone these days. But we definitely intend to carry out what we believe are the intentions of this bill.

Senator MCCAIN. Senator Gorton, do you have any questions?

Senator GORTON. Not at this time.

Senator MCCAIN. Mr. Rogers, you said in your statement that there are departmental regulations concerning your policy on Native American religious freedom?

Mr. ROGERS. Yes, sir. I would be happy to submit management policies of the National Park Service for the committee's use, if you are interested.

Senator MCCAIN. And you, Mr. West? Do you have departmental regulations?

Mr. WEST. We have a Forest Service policy written on the American Indian Religious Freedom Act activities.

Senator MCCAIN. Mr. West, to your knowledge has your agency participated in the development of an ethnographic data base similar to the one described by Mr. Rogers?

Mr. WEST. The question was, should we?

Senator MCCAIN. Are you? Or have you?

Mr. WEST. Let me ask Mr. Tippeconnic that.

Mr. TIPPECONNIC. Mr. Chairman, it is underway in places in California.

Mr. ROGERS. Mr. Chairman, I think it is important for us to have a clear understanding of this. The ethnographic data base which we need, we have not yet built. You are correct in pointing out that we are a long way from where we need to be.

Senator MCCAIN. Thank you very much for being here today. We appreciate it very much.

Mr. ROGERS. Thank you, sir.

Mr. WEST. Thank you.

Senator MCCAIN. The next witnesses will be Mr. Ivan Sidney, Chairman, Hopi Tribe, and Mr. Leonard Haskie, who is the Interim Chairman of the Navajo Tribe.

Welcome to both distinguished Arizonans and outstanding leaders. We are privileged to have you before us today.

Before you proceed, for Mr. West and Mr. Rogers, we will have further questions to which we would like written responses. We will keep the committee record open for 2 weeks.

Senator MCCAIN. Without objection we will include this document, which is Management Policies, U.S. Department of the Interior, National Park Service, 1988, in the record.

[Document appears in appendix.]

Senator McCain. Welcome. Which of you is senior? Do we go by age or time in office to choose?

Mr. Sidney. By looks. [Laughter.]

Senator McCain. By looks? Mr. Haskie, please proceed.

I welcome both of my very good friends here today. Thank you for taking time from your very busy and heavy responsibilities to your tribes to be with us on this very important issue. We are grateful that you could be here. Thank you.

Go ahead, please.

STATEMENT OF HON. LEONARD HASKIE, INTERIM CHAIRMAN, NAVAJO TRIBAL COUNCIL, WINDOW ROCK, AZ

Mr. Haskie. Thank you, Senator McCain, committee members. I am very pleased to be here, along with Chairman Ivan Sidney. I have a prepared statement to be placed in the record.

Senator McCain. Without objection.

Mr. Haskie. Mr. Chairman, members of the committee, I am honored to have been invited to testify before you on S. 1124, a bill to amend the American Indian Religious Freedom Act of 1978. On behalf of the Navajo Nation I would like to express my personal gratitude to you, Senator McCain, for introducing this measure.

The Religious Freedom Act was expressly designed to protect and preserve for American Indians the freedom to believe, express, preserve, and exercise their native religions. The act states that this includes the protection and preservation of access to sites and the use and possession of sacred objects. Mr. Chairman and members of the committee, this is a good and important policy.

This vital act must be designed and implemented with the utmost concern and sensitivity to the diversity and uniqueness of the religious practices of American Indians, Native Alaskans, and Native Hawaiians. The American Indian Religious Freedom Act embodies an objective which must be used to guide decisionmaking to preserve and protect religious freedom.

The proposed amendments will be essential to this effort. Since the act's creation American Indians who have earnestly sought protection of their right to exercise their religions have suffered tremendous disillusionment as courts have repeatedly interpreted the act as an empty Congressional acknowledgment of Native American culture.

Court decisions which appear to offer protection to native people to practice their religions have ultimately resulted in hollow victories. For example, in 1989 the Navajo Nation sought protection under the Religious Freedom Act to allow our people and religious leaders living in Southern Utah to continue to exercise their religion at the sacred site known as Rainbow Bridge. Denying our claims, the appellate court held that the drowning of our gods, denial of access to our prayer sites, and the desecration of our sacred site was not an infringement upon the free exercise right of our Navajo people and religious leaders. Our people sought only an accommodation of their religious interests, not a complete bar to the use of Rainbow Bridge by all others. Instead, our tribe has been forced to tolerate the unmitigated desecration of this religious site.

In 1983 the Navajo Nation, in a joint effort with the Hopi Tribe, fought another legal battle for religious freedom. In this instance we sought protection under both the Religious Freedom Act and the First Amendment to stop the desecration of an area, sacred to both our people, commonly known as the San Francisco Peaks. Again the act was interpreted by the court as a policy statement that only required "agencies to learn about, and to avoid unnecessary interference" with Indian religious practices. Because the act contained no explicit directives requiring agencies to do more, the sacredness of our honored mountains and the home of the Hopi Kachinas suffered in the hearts of our people and religious leaders as the way was cleared for the Snow Bowl Ski Resort expansion. In the court's opinion, our religious practices did not fall within First Amendment protection because Navajo and Hopi people were not denied access or coerced into practices against their religion.

At the end of a long legal battle, in 1988, the U.S. Supreme Court delivered a further blow to the religious freedom of Native American people in a decision which stated that the free exercise clause of the First Amendment did not forbid the Government from constructing a timber road through a sacred site. Through this decision the Supreme Court undermined the foundation of religious freedom by denying American Indians the protections afforded to other Americans.

This record of disappointment evidences the need for Congress to reconfirm the goals and strengthen the enforcement of the act. The protection and respect accorded to the religions of native people must be equal to those accorded other religions. It is because of these concerns that the Navajo Nation supports S. 1124 as an effort to strengthen the policy behind the Religious Freedom Act.

S. 1124 is correct in its finding that the traditional practices of Native American religions are inseparably bound to land and natural formations. Land and other natural resources are as sacred to us as churches, synagogues and cathedrals are to other religious people around the world. Equally important is the declaration that "lack of sensitivity or understanding of traditional Native American religions on the part of Federal agencies vested with the management of Federal lands has resulted in the lack of a coherent policy for the management of sacred sites found on Federal lands." The lack of coherent management and basic respect for sacred sites has resulted in the sad history of infringement of religious freedom suffered by Native Americans.

The strength of the proposed amendments is contained in section 3(a). The Navajo Nation supports the proposition that Federal lands which contain sacred sites whose use is necessary to the practice of native religions shall not be managed in a manner which will pose a substantial and realistic threat of undermining and frustrating such religion or religious practice. It is the position of the Navajo Nation that the original intent of the act can be carried out only with a clear mandate as stated in section 3(a).

However, the strength of section 3(a) is diluted by the express exception found in section 3(b)(1)(A), which affords agencies broad and dangerous discretion. The Navajo Nation strongly urges that the language of section 3(b)(1)(A) be altered so that the stated intent of the act is not consumed by the exception.

The Navajo Nation realizes that accommodating the divergent interests between native people, who seek protection of their right to exercise their religious practices, and Federal agencies responsible for the management of Federal lands, is not an easy task.

In the effort to reach mutual accommodation we recommend that the amendments to the act direct agencies which manage Federal lands to keep complete records of agency consultations and decisions which concern and impact native religious practices. Complete recordkeeping will assist agencies in becoming aware of the legitimate concerns of native people with whom the agencies have consulted. Complete documentation will then be available as a full record of the agency policy that took place in reaching a final decision. Such a procedure will add substance to the decision-making and credibility to the review process.

In closing, I would like to express my thanks to each of you for your efforts to protect the heritage of my people. In addition, I would like to remind you that by protecting our religious heritage you protect and defend your own heritage of religious freedom for all Americans.

Thank you for this opportunity to communicate to you the position of the Navajo Nation on S. 1124.

[Prepared statement of Mr. Haskie appears in appendix.]

Senator McCAIN. Thank you, Chairman Haskie.

As you may have noticed, there is a vote on the floor of the Senate, which will be followed by several votes. Since we have several panels here that need to be heard from, in keeping with the rules of the Senate I will ask Mr. Parker and Mr. Eberhard to take over further conduct of the hearing until such time as I can return. We appreciate your being here and your testimony, so please proceed.

STATEMENT OF HON. IVAN SIDNEY, CHAIRMAN, HOPI TRIBAL COUNCIL, KYKOTSMOVI, AZ

Mr. SIDNEY. Thank you, Mr. Chairman, for allowing me to present testimony on S. 1124, the American Indian Religious Freedom Act Amendments of 1989. Also, it is an honor to sit alongside the chairman of the Navajo Nation, Mr. Haskie.

The Hopi Tribe of Arizona is proudly one of the longest surviving inhabitants of the North American continent. Our village of Oraibi is indisputably the oldest continuously occupied settlement in the continental United States. We reside and have worshipped freely in northeastern Arizona lands, centuries before Columbus discovered America. At the heart of our longevity is our religion, an infinite source of strength from generation to generation.

Our religion embodies a world view of life which is deeply intertwined with and represented by the natural land structures of our region. Hopi existence relies upon the unbroken observance of natural laws. Our religious ceremonies are adherent in maintaining the harmony of the universe. The Hopi people continuously attempt to preserve, to the greatest extent possible, observance of their ceremonial customs. This, of course, means preservation of the natural land sites and natural resource materials used as part of our ceremonies, and requires unencumbered access to those sites.

I believe that all Native American peoples have an inherent right to the free exercise of their religion. That right is reaffirmed by the U.S. Constitution in the Bill of Rights, as well as in our tribal constitution. In 1978 the United States Congress took an important step toward protecting and preserving Native Americans' rights to the free exercise of their religion with the enactment of the American Indian Religious Freedom Act. This act set in place a national policy of protecting and preserving for Native Americans the freedom to believe, express, and exercise their traditional religious prerogatives. The act directed various Federal executive agencies responsible for administering relevant laws to evaluate their policies and procedures to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices.

The legislation we have before us today, S. 1124, is legislation which amends the American Indian Religious Freedom Act by establishing an enforcement mechanism to ensure that the management of Federal lands does not undermine and frustrate traditional Native American religious practices. The legislation would create a new statutory cause of action on behalf of any party aggrieved by Federal Government activities that occur on Federal lands used by traditional Native Americans in religious observance. The challenger and challenged would have established burdens of proof under the legislation. For example, the challenger must prove that the decision of the Federal agency will pose a substantial and realistic threat of undermining and frustrating a traditional Native American religion or religious practice.

As a refinement and enhancement of historic legislation designed to ensure and protect Native American religious practices, this legislation is to be applauded and supported. Nonetheless, there are certain perils that the committee needs to take into consideration.

Because the religious freedom issue is an emotional and moral issue, deciding where one's rights begin and another's end is difficult at best. Accordingly, it is imperative that this admirable legislative effort not become a vehicle for mischief. Therefore, while supporting the concept of this legislation—that of putting an enforcement mechanism in place—I would respectfully urge the committee to consider carefully certain potential and troubling ramifications of this bill as drafted.

Specifically, I am concerned that the pending legislation might further complicate an already complicated state of affairs in northern Arizona relating to the historic Navajo-Hopi land dispute, with which I know this committee and the Congress are all too familiar.

As you know, Hopi ceremonial and religious shrines are significantly dispersed through the four-corner region which includes the Hopi and Navajo reservations. Certain of these sites are already the subject matter of important litigation pending in Arizona and having a direct impact on the relocation process. Such litigation is presently being considered by the Federal District Court in Phoenix, appropriately within the larger context of the partition and relocation processes mandated by the Congress in the 1974 Settlement Act, as amended.

It strikes me, with all respect, that it would be inappropriate for the Congress to inadvertently affect the disposition of such cases, already proceeding pursuant to a comprehensive statutory scheme under the administration of the Federal Court in Phoenix.

Therefore I urge and caution the committee to take appropriate action to fine-tune this meritorious legislative work product so as to avoid this concern. How might this be done? There are several possibilities that come to mind, such as removing from the scope of the bill the following: A, former JUA land altogether; or B, lands subject to judicial decrees of partition; or C, Government agency action already the subject of existing court orders or decrees; or D, Government agency action in support of land management or range conservation practices undertaken at the request of and with the concurrence of an Indian tribe on land belonging to that tribe.

Mr. Chairman, Senator McCain, distinguished members of the committee, I respectfully urge the consideration of these suggestions, along with other options that might be responsive to my concerns.

Let me be clear that the Hopi Tribe fully embraces the intent of this legislation. It promises a necessary and worthwhile improvement in current law. Nonetheless, the Hopi people have spent far too much time in court protecting our rights as determined by the Congress. Too often we have seen new legislation seized upon as new bases for litigation designed to frustrate and delay the orderly implementation of the relocation process. I respectfully implore the committee to take necessary steps to ensure that this worthwhile legislation cannot be utilized by outside agitators or others for such a purpose.

Finally, allow me to once again commend Senator McCain and his staff for this legislative initiative to improve and protect the rights of Native Americans. As chairman of a tribe whose people believe protection of our religious customs lies at the core of our existence, I applaud this undertaking. I also sincerely thank the committee for providing me the opportunity to testify today.

[Prepared statement of Mr. Sidney appears in appendix.]

Mr. **Parker**. Thank you very much, Chairman Sidney and Chairman Haskie. I assure you that I know the difference between testifying to a member of the staff and testifying to a member of the committee. I know that Senator McCain and the other members of the committee would certainly be here if they could, but I know you are also aware that the Senate has before it appropriations bills and other end-of-the-fiscal-year items that are just "must" bills, so until such time as Senator McCain or other members of the committee are able to return, I appreciate the fact that you will bear with us and allow us to proceed with the hearing. I know that Senator McCain's staff has a number of questions that they would like to ask you for the record.

I appreciate your testimony. I wonder if either of you are familiar with the facts relating to the Lyng case, also known as G–O Road case, the U.S. Supreme Court case last year dealing with the Indian Religious Freedom Act.

Chairman Haskie, are you familiar with the facts of that case?

Mr. **Haskie**. If you would just give me a few minutes——

Mr. **Sidney**. While he is looking there, I will respond by saying that I don't know the particular details of that case. I would have to consult staff in order to make further comments on it, but we would be happy to respond to that if there is any question on it and with our position on it.

Mr. **Parker**. Well, my question was really going to be whether or not you could provide the committee, as a followup to the hearing and a followup to your testimony, with your analysis of whether the bill that is before the committee would provide adequate protection to the Indian religious freedom interest that was at stake in that case. If you were to sort of hypothesize and say, this bill that is in front of us, and the facts of that case in front of us, putting those together, would this bill—if already enacted into law—have protected those interests?

Mr. **Sidney**. With the permission of the committee, we would be happy to respond to that after I consult staff.

Mr. **Parker**. Thank you very much.

Chairman Haskie, now that you are an instant expert? [Laughter.]

Mr. **Haskie**. I think the initial ruling appears to be quite appropriate, fitting the attitude and religious awareness of the Indian people. I think the reversal certainly violates the First Amendment as it relates to religious exercise, because in many cases the Indian people are accustomed to peacefulness when they worship gods. That's the only time they get a chance to be in harmony and be consistent with gods. Otherwise, when you have rumbling and forest cutting and road construction, and at the same time you try to maintain peace with your Supreme Being, then actually in essence you have no assurance of communication. So I totally support the initial position.

The second one, I might point out to you—I know it's going to have a ramification with respect to Peyote Way Church, Inc. v. Meese in Northern Texas, Dallas District. I think that's going through appeal. I think certainly in the future, if accommodations are not well versed with clarity as to the actuality of legislation, certainly there are going to be problems that will be compounded by this particular decision. Either way, it is certainly going to complicate the issue. Especially, this particular case is the subject of the validity of constitutionality with the State and the Federal Government. That's why it is necessary, with a great deal of anticipation by Indian people, that we be provided with assurance as to what kind of legislation is good and encompassing our religious acts.

I think Senator McCain ought to be commended for the initiative he has undertaken in getting a piece of legislation that certainly would accommodate something like that. Furthermore, I think it's going to clarify a lot of doubts and questions and suspended issues. So it's always a start, to initiate a legislative process.

Mr. **Parker**. Thank you very much.

I would also suggest you might consider commenting on the official statements by the two Federal agencies earlier, those who preceded you, should you think that would be helpful to the committee.

Mr. **Sidney**. Mr. Parker, I have two issues for the committee to consider on this bill. We refer to the State; State lands—Federal lands in this case is clear—but I think there should be some research into the State lands, which does affect us back in Arizona.

The other one is on the cause of action, where it talks about Federal courts; maybe tribal courts, where it is appropriate, because our courts have better understanding of our traditional customs and such. So those two areas, I would suggest, should be looked into.

Mr. **Parker**. Thank you very much, Chairman Sidney.

Mr. **Haskie**. Mr. Parker, before I excuse myself, I would like to submit for the record a comprehensive study relative to sacred sites surrounding Big Mountains. Perhaps this could be used as substantive material. Also, we would like to indicate that we totally support that the proper forum should be in the tribal court anytime you have unclear definition as to what kind of religious activities are being engaged in.

I think that certainly would alleviate a lot of problems associated with Native American religious activities. Thank you.

Mr. **Parker**. Let me say that I think that's a very good suggestion to have in front of us. I appreciate it.

Eric, do you have any questions that you want to ask for the record?

Mr. **Eberhard**. I guess this is for both chairmen. The Park Service testified here, just moments ago, that they are engaged in an ethnographic study and development of an ethnographic data base. I wonder if either of you or anybody on your staff has been contacted by the Park Service with respect to an opportunity to have input into the development of that data base?

Mr. **Sidney**. We certainly would welcome the opportunity to be involved. We do have a Cultural Preservation Office, headed by Mr. Jenkins, who would be the proper person to contact. We would certainly be very happy to communicate in that process.

Mr. **Eberhard**. Chairman Haskie, within the Navajo Nation I believe there are at least two National Park facilities, the Navajo National Monument and Canyon de Chelly. Has the Navajo Nation been contacted by the National Park Service with respect to input into any ethnographic studies being conducted at those facilities?

Mr. **Haskie**. Mr. Eberhard, I certainly would look forward to having linkage as far as communication is concerned with the National Park Service. But in recent times, the only time we get any kind of communication is when there is archaeological evidence or other traces that would mean obstruction to any progressive development of utilities or other things. Other than that, as far as religious practices are concerned, we hear of no communication. So I think it would be in order that we have those kinds of procedural communications. I think it's always better to be apprised of what's going to happen.

I think it is also important to convey to you that this legislation would accommodate what is going to be forthcoming in the future. I think what is in the past has always been the only typical indication of concerned expressed by either the National Park Service or the Forest Service.

Mr. **Eberhard**. I would ask both of you when you return home, if you would, to check with your appropriate tribal staff to see if there has been any contact from the National Park Service with respect to the development of their data base; and if there has, what the nature of that has been. If you would, just send us a letter letting us know the results of your inquiries.

I'd like to ask you both another question. For the most part, we're really talking about three Federal agencies that are involved in these matters. Two of them were here today, the Forest Service and the National Park Service. The other one, of course, is the BLM. Occasionally these matters do involve other Federal agencies, but I know Senator McCain is very interested in the question of whether we need one national standard that applies to questions of any religious practices on Federal lands. I know he would appreciate hearing, for the record, your views on that, if you would share that with us—Chairman Sidney?

Mr. **Sidney**. We are all native people, but we are all different as far as our cultures and our concerns and our religious practices. That in itself gets very complicated.

Now, if we can alleviate that to a singular type of approach, I would support that. We have enough bureaucracy on the reservations; dealing with so many bureaucracies, we can fine-tune that. And with the help of Senator McCain, that would be of tremendous assistance to our governmental affairs.

Mr. **Eberhard**. Thank you.

Chairman Haskie.

Mr. **Haskie**. Mr. Eberhard, I certainly appreciate the opportunity to institute a mechanism that would pool or consolidate all efforts currently being administered by the three Federal entities. I think that would certainly expedite a lot of proceedings, rather than going from one entity to the next in trying to gain access or procurement of approval or authorization to do whatever. I think that suggestion is well taken.

Mr. **Eberhard**. Thank you.

That concludes my questions, Mr. Parker.

Mr. **Parker**. Thank you very much.

Mr. **Sidney**. Mr. Parker, again, I appreciate the committee and every opportunity where we can come together and testify on issues which we agree on. It will certainly assist both of us. Maybe we brought good weather with my friend being here today. Thank you very much.

Mr. **Parker**. Thank you again.

Our next panel of witnesses will be the Honorable Reuben Snake, Council Member, Winnebago Tribe of Nebraska; Mr. Will Mayo, Director of Planning and Special Assistant to the Executive Director, Tanana Chiefs Conference, from Fairbanks, Alaska; and Mr. Walt Lara, Yurok Tribal Member from Trinidad, California. Would that panel please come forward?

I mentioned to Chairman Haskie and Chairman Sidney that our directions from Senator McCain are to proceed with the hearing, and give us an opportunity to establish a hearing record on this legislation. I appreciate your bearing with us and proceeding while the Senator is tied up with floor action in the Senate.

From the panel here I would invite, first of all, Mr. Reuben Snake to provide testimony to the committee.

STATEMENT OF REUBEN SNAKE, COUNCIL MEMBER, WINNEBAGO TRIBE OF NEBRASKA, WINNEBAGO, NE

Mr. SNAKE. Mr. Parker, I want to say thank you to the committee for the opportunity to give testimony on behalf of the Hochunk people, those who are known as the Winnebago Tribe.

According to the letter I received, we were obliged to submit 30 written copies of our testimony, which we have done. That should be in your hands, so I am not going to read that testimony, but I do want to make an oral statement in relation to the legislation.

The Winnebago Tribe of Nebraska is in support of the amendments. The Hochunk people have a long and illustrious history, and like all other ethnic groups throughout the world, our identity as a people is based upon our myths and our legends which tell of great, tremendous migrations across the breadth and the width of this great Turtle Island that some people refer to as the Western Hemisphere and the continent of North America.

Throughout these countless generations of movement across this land, our ancestors did in fact commune with the Creator of all things, on the mountain tops, by the river streams, by the lake shores, in the forests, wherever it was that they were moved to do this. So to my people the land, all of it, is sacred, and to my people it was not a barren wilderness. So we hold the land to be sacred.

We are desirous of having that opportunity to continue on with our ages-old practice of worshipping the Creator of all things throughout this great land of ours.

I wanted to quote some of our illustrious ancestors. Chief Luther Standing Bear of the Oglalla Sioux Tribe, some 75 years or so ago, made the statement that "The very earth upon which we walk is made up of the flesh and the blood and the bones of countless ancestors." And until he has been here that long, as long as we have, the white man will not be able to divine the rhythm of the land.

So it is incumbent upon us, who are the grandfathers and the grandmothers of the human family in this Western Hemisphere, to continue to try to educate our grandchildren as to how to respect this creation and this land upon which we all depend.

I wanted to quote a few excerpts from a letter of another one of our illustrious ancestors, Chief Seattle of the Duwamish Tribe, when he was approached by representatives of the U.S. Government to sell some of their land. This is what Chief Seattle wrote 135 years ago to the President of the United States: "Every part of the earth is sacred to my people, every shining pine needle, every sandy shore, every mist in the dark woods, every meadow, every humming insect, all are holy in the memory and experience of my people. We know the sap which courses through the trees as we know the blood which courses through our veins. We are part of the earth and it is part of us. The perfumed flowers are our sisters. The bears, the deer, the great eagle, these are our brothers." And he goes on to say, "We know the white man does not understand our ways. One portion of the land is the same to him as the next, for he is a stranger who comes in the night and takes from the land whatever he needs. The earth is not his brother, but his enemy, and when he has conquered it he moves on. He leaves his father's graves and his children's birthplace is forgotten." He continues, "We love this earth as a newborn loves its mother's heartbeat. So if we sell you our land, love it as we have loved it. Care for it as we have cared for it. Hold in your mind the memory of the land as it is when you receive it, and with all your strength, with all your mind, with all your heart, preserve the land for all your children and love it as God loves us all."

Thank you.

[Prepared statement of Mr. Snake appears in appendix.]

Mr. PARKER. Thank you very much, Mr. Snake. On behalf of the Chairman I would certainly like to acknowledge that your testimony will be helpful to the committee to appreciate what is at stake here with this legislation.

Before asking any of this panel any questions I think it would be more appropriate to provide the other witnesses with an opportunity to make their statements, and then we could come back to the questions.

The next witness would be Mr. Will Mayo, Director of Planning with the Tanana Chiefs Conference of Fairbanks, Alaska. On behalf of the committee, Mr. Mayo, I appreciate your being here today. Please proceed with your testimony.

STATEMENT OF WILL MAYO, DIRECTOR OF PLANNING, TANANA CHIEFS CONFERENCE, FAIRBANKS, AK

Mr. MAYO. Thank you, Mr. Parker. My name is Will Mayo, representing the Tanana Chiefs Conference of Fairbanks, Alaska.

The Tanana Chiefs Conference is a tribal consortium of 43 tribal villages in the interior of Alaska. We are primarily Athabascan people.

The Tanana Chiefs Conference wishes to express its support for this legislation, S. 1124. However, we do have some concerns with some sections. I would like to draw your attention to our written testimony which we have submitted for the record, in which we make some express recommendations or suggestions for the committee's consideration.

We deeply appreciate the opportunity to share with you our feelings and concerns on this legislation.

The whole issue of the Indian Religious Freedom Act brings to mind something that many of our young people learn early in their experience as Indian people. I remember my uncle and I went hunting. My uncle was taking us through the woods; we were hunting for moose. Everywhere we looked we were amazed because we could see moose tracks everywhere. They criss-crossed through the woods in every direction, and sometimes their paths were really deep, ancient paths in the woods.

At one point I was very excited and could not contain my excitement. I whispered to my uncle, "Look, there are moose tracks here." He said something to me that I'm sure his relatives said to him and that our forefathers for many generations have spoken to the young hunters who saw the moose tracks. He said, "If you try to live from soup that has moose tracks, you will only be hungry."

That reminds me of the lesson that we have learned through the Religious Freedom Act. My uncle was trying to tell us that we had to keep our eyes out in the woods where the moose were, and not on the ground to see only their sign and what that sign meant.

So the Indian Religious Freedom Act is much like those moose tracks. It has not provided satisfaction. It is not able to sustain the things that we deeply hold to be true in our lives and the lives of our ancestors and in the lives of those who come after us.

So, with the Indian Religious Freedom Act we are starving for the respect and the protections that we need to protect our religious freedoms. These amendments go a long way toward relieving that problem.

The religious practices of the Athabascan people in the interior revolve around two central themes. One of them is respectful treatment for everything in our world and for all the living things in the world. Each of them deserve respectful treatment, and how they are treated by the individual is a measure of a person's value and worth.

The other theme is the memorial and funeral potlatches which are the community and the family expressing their grief, but also more importantly, in releasing of the spirit of loved ones who have passed away. That also is centered around the concept of respect.

When a person in our tribe passes away, that person is given two potlatches. The first one is the funeral potlatch in which we bury that person's body. The second one is normally conducted one year later; that is called the memorial potlatch, and it is the point where the family releases the spirit of the deceased.

One of the vital ingredients in our potlatch ceremonies and the potlatch event is that of the young men going out to take fresh moose meat that will be shared with the community by the family of the deceased. It is the central and vital aspect of our practices.

In 1980, the Alaska National Interest Lands Conservation Act was passed, which moved much of Alaska's lands into the management and ownership of the Federal Government. There were created parks and reserves and so on. ANILCA, as it is called, allows the Federal Government to delegate authority to manage fish and game resources on Federal lands, so the State of Alaska manages the Federal fish and game resource.

Historically, the State of Alaska has criminally prosecuted Athabascan people who have been participants in the taking of moose for our funeral and memorial potlatch ceremonies. However, in 1978 a very important case was won by the tribes in the State Supreme Court where the court ruled that the taking of a potlatch moose in the funeral potlatch was a religious practice that is protected under the free exercise clause of the U.S. Constitution. So there was one important victory.

Yet, today our people are still being jailed and hauled into court over the memorial potlatch ceremony. The Tanana Chiefs Conference has been in Federal District Court for six years fighting this argument. Recently the court held that the taking of the memorial potlatch moose is a religious behavior, and they are currently considering whether or not the State must allow the Athabascan people to take moose outside of the established hunting seasons.

We, of course, are interested in seeing the freedom of taking moose outside of the established seasons because people don't only die during the hunting season, or not all of them, so we need to be able to exercise that right during other times of the year.

The point that I am getting to is that the State of Alaska has been delegated authority to manage the Federal land resource. The Federal Government will not interrupt us in our practice of our religious acts, and the State of Alaska should not have that right or ability, especially when they are managing Federal lands under a delegated authority.

So our first request and concern is for the consideration of the committee, that they might include language in this bill that would indicate that State and local governments who are delegated management authority would also be held accountable under the provisions of this bill. That is our first concern and one of our major concerns at this time.

We have another concern with a section of the bill under 3(a). Under 3(a) it would appear to us that the requirements that a religious practice be shown indispensable and that it be proven sacred—requirements such as this indicate to us the possible interpretation by some that religious practices are not protected under this bill unless they question the very existence of that religion. Our fear is that the existence of the religion may be protected, which is rarely questioned, but many of the acts and practices of that religion on the land and of the resources—for example, the potlatch moose—would not have an adequate level of protections under this language.

So what we would like to suggest respectfully is that consideration be given to this language, the use of the term "indispensable" and the burden of proof that lies on the tribes to show that something indeed is sacred and indispensable, because we fear that it would only protect in the case of the existence of a religion being questioned.

In our written testimony we have some specific recommendations.

Lastly, our concern in section 3(b). This section goes beyond the House version. The House version was regarding the compelling Federal interests. Compelling Federal interests, we can live with; but the language in this section in S. 1124, in (a) and (c), bring us to question what the extent is of the powers of the Administration. It would seem that this possibly could protect the discretionary actions of Federal managers. We do not feel that this would be in the best interest of the protection of tribal religious practices. Too much discretionary power that we fear under that section would undermine the power of this bill to truly protect.

So we have suggested some language, also in our written testimony, that would more narrowly define the instances and the legal responsibility of the so-called "vested interest" sections.

I would just like to say that I am very appreciative to be able to share these concerns with you. If you desire any further information, we would be glad to supply it.

Thank you, Mr. Parker.

[Prepared statement of Mr. Mayo appears in appendix.]

Mr. **Parker.** Thank you, Mr. Mayo. On behalf of the committee I thank you again for your statement. Of course, as with all the witnesses, the full text of your written statement is an official part of the record, and your oral testimony will be very helpful to the committee.

I wondered if you had a copy of the House companion bill that you referred to in your testimony; we could also include that within the hearing record.

Mr. **Mayo.** Yes; I do have a copy, but it is in Fairbanks. I could fax it to your office upon my return, or possibly find one somewhere in this town.

Mr. **Parker.** Well, I think we could probably find one somewhere in this town, too. But that's H.R. 1546, which has been introduced by—I believe Mr. Udall is the primary sponsor. So for purposes of the record, we would consider that officially also, on notice to the committee.

[Text of H.R. 1546 follows:]

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101st CONGRESS
1st Session

H. R. 1546

To amend the American Indian Religious Freedom Act of 1978.

IN THE HOUSE OF REPRESENTATIVES

March 21, 1989

Mr. Udall introduced the following bill; which was referred to the Committee on Interior and Insular Affairs

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A BILL

To amend the American Indian Religious Freedom Act of 1978.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. This Act may be cited as the "American Indian Religious Freedom Act Amendments of 1989".

Sec. 2. The American Indian Religious Freedom Act (42 U.S.C. 1996) is amended by adding the following new section 3:

"Sec. 3. (a) Absent a compelling Federal interest, Federal lands that have historically been either part of, or necessary to, or been used by, a traditional Native American religion, shall not be managed in a manner that will pose a substantial and realistic threat to undermine and frustrate any traditional Native American religious practices.

"(b) The United States district courts shall have the authority to issue such orders as may be necessary to enforce the provisions of this section.

"(c) Any party challenging an agency action under this section will have the burden to prove that the proposed action will pose a substantial and realistic threat to undermine and frustrate a traditional Native American religious practice. If such threat is established, the Federal agency will have the burden to demonstrate that the Federal interest is compelling. If the Federal interest is found to be compelling, the Federal agency shall have the duty to select the course of action that is the least intrustive on such Native American Religious practices.".

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Mr. **Parker**. The final witness in this panel is Mr. Walt Lara from the Yurok Tribe. On behalf of the committee, Mr. Lara, I appreciate your being here, and please proceed with your testimony.

STATEMENT OF WALT LARA, YUROK TRIBAL MEMBER, TRINIDAD, CA

Mr. **Lara**. I submitted a paper that more or less introduces me to you, so that maybe we could do something to assist in this bill, to make it better.

My name is Walt Lara. I am presently Chairman of the Northwest Indian Cemetery Protective Association of Northern California. My organization and people were the ones involved with the G–O Road case.

We have had a lot of people testify that we have laws that are supposed to protect us, but when we get into the situation of stopping the roads or stopping the logging, then we don't have anything. At this particular time we moved the G–O Road situation into the California Heritage Commission in order to be eligible for a lawsuit. They used the First Amendment, but the Constitution of the United States was developed for the non-Indian, not the Indian. So they took it clear to the Supreme Court, and without any of the people being of Indian descent or Indian knowledge to make the correct decision there—judges for something that belonged to the Indian people that was left there by the Creator that had told us to protect it and keep it as His caretakers as we lived on this earth. They ruled that the road was more important to economic development than the Indian culture and the Indian religion and their beliefs. That's what is bad for Indian religion.

We are here in America. We have people here that we send to other foreign countries. We have a place here in Washington, DC, with a bunch of flags, they all go in there and get educated on how to act and treat, to abide, to be proper with these foreign cultures. You've been here in America for over 200 years and you're still insulting the Indians, because you don't know what we do for our lives to be people. That's why we need to have something we can use in this system to protect our paths and our culture and the religion that we still practice in this day and age.

We all support the Indian people in my part of the country. Five different tribes around 100 square miles, and it's all different types of religion—almost the same, but it's a little different. We can't develop one single policy to cover the whole area, but we should at least have a policy for the National Forests and National Parks, with the State park systems included, that we know that we can deal with so that if they don't adhere to what the law says, then we can take them to court and make them do what's supposed to be right.

So we support the amendment and we would like to be able to submit more recommendations on how to make this bad situation better.

It is very, very personal to me. I think that's true of all of the Indian people here. I know that when the G–O Road case got in the Supreme Court and why it turned out the way that it did, I felt that we owed an apology to a lot of Indian people. But then again, if it didn't go to the Supreme Court we probably wouldn't be here today, trying to amend this thing to make it work.

So we can only do the best that we can do. I hope that you people here assist us, and I hope that the people that are opposed to it realize that our ancestors were here that accepted yours to come here in the first place. I can't say any more. We will put something together, but I just want you to know our feelings on this situation.

Thank you.

[Prepared statement of Mr. Lara appears in appendix.]

Mr. **Parker**. Thank you very much, Mr. Lara. I am sure that your direct testimony to the committee will be helpful to give us a more common sense perspective on what we're dealing with in this legislation.

If I could direct a question before turning it over to minority counsel, regarding the testimony of the Government witnesses again, Reuben Snake and Will Mayo and Walt Lara—you heard the testimony of the Government; basically, their position is that they don't feel that legislation is necessary, and for that reason they would oppose legislation. Their testimony described the procedures that are now being employed in order to try to respond to this interest of the American Indian Religious Freedom Act and practice and exercise of traditional Native American religions.

As I am sure you are all aware—and particularly you, Mr. Lara—the U.S. Supreme Court in the G–O Road case concluded that there was no authority for individuals who felt that their rights had been injured by action of a Federal agency to go into court. In effect, the Court concluded, as I understand that decision, that there was no cause of action in that the individuals, either individually or as a class of individuals, who felt that their rights had been injured are not now able to go into court as a consequence of the Supreme Court's decision in that case. As other witnesses will be describing in more detail, in the U.S. Supreme Court's decision, in writing for the majority, the Court in effect referred to the legislature as being the arm of the Government that might more appropriately define the terms and conditions under which these interests can be asserted and ought to be able to be enforced as a matter of Federal law.

Would you provide the committee your view on whether or not the existing procedures and practices of the Federal agencies are adequate, in your opinion, to protect these rights? Or do you feel like this kind of legislation is fundamentally necessary?

Mr. Lara, please?

Mr. **Lara**. No; as an example, the Forest Service's policies to deal with Indian people are not adequate, no. In the past it was so bad that our neighboring tribe, the Karuk Tribe, have station, Somos Bar Substation, Ukmom Ranger Station built right on top of their ceremonial grounds.

It seems as if in the past they did as they pleased. In the State of California, when California's Attorney General took the case, the people in California were opposed to the G–O Road and the Forest Service still insisted on doing it in California. So they weren't doing the people's wishes in California. I think the G–O Road is an example that the Forest Service does as they please. I don't think they needed the road there; I think they wanted the road there.

The Indians opposed it and said that they were going through their sacred ceremonial site, and they wanted to put it through there anyway, so they did. They took it clear to the Supreme Court just so that we wouldn't have anything to say.

I worked on Forest Service land in the last year and a half in the Somos Bar-Forks of Salmon area. No Indian people involved in any of their policy-making. They had botanists, they had people dealing with the land, doing the roads, they had archaeologists there looking for sites, but no Indian people around. The only Indians that were there were the Indians I had working for me.

Mr. **Parker**. Thank you very much. That's very helpful testimony.

Reuben?

Mr. **Snake**. Yes; I'd like to make a comment in relation to your question, Mr. Parker.

I think any novice student of the American political system understands that the will and intent of Congress is many times subverted and thwarted by the Federal bureaucracy. I can point to some classic examples in relation to Indian people.

The first one that comes to mind is the Johnson-O'Malley Act which provided Federal funds to public school systems throughout this land from 1936 to 1970 in the tens of millions of dollars for the compensatory educational needs of Native American children. When we looked at the record we found out that very little of this money actually ever got into what it was designed to do for Indian children. That's just one example.

So personally, I don't put much faith in the statements of Federal bureaucrats who say that they have our best interests in mind. Therefore, my tribe said this, and it is a written recommendation: "The criteria listed under section 3(b)(1)(A)," carry out the legal responsibilities of the Federal Government, is a loophole which will allow Federal agencies to subvert the intent and purpose of the American Indian Religious Freedom Act and should be stricken," and goes on to say in recommendation number four that "Federal agencies should be mandated to promulgate regulations to implement the American Indian Religious Freedom Act." That's our response.

Mr. **Parker**. Thank you very much.

Will Mayo.

Mr. **Mayo**. I don't believe that the procedures are adequate. I don't believe that they provide the protections that we require, which is why we would like to see the law provide greater protection, and in the event that the regulations are promulgated, that they be promulgated in a manner that is consistent with the Congressional intent for greater protection.

When that occurs, we will also be watching then. So that is my answer.

Mr. **Parker**. All right. Thank you.

As Acting Chairman I wish to express my appreciation for your testimony—Mr. Lara, you have one other point?

Mr. **Lara**. When the Freedom of Religion Act had passed and was signed into law, the directive to the National Park Service and the National Forest System and the Bureau of Land Management and all Federal agencies was to sit down with the Indian people and develop a policy. It even dealt with the policy in the Philippine Islands, I think it was, to deal with the Filipinos. It went quite a ways.

We put meetings together and we sat down. We met with the National Park Service, but the National Forest Service never did participate. The National Forest Service never did participate, okay? The State park systems participated.

We developed the policy. The policy that was developed with the State park system, when Governor Brown left after being Governor and the new Governor came in, then that policy went out. Now the Indians can't gather our fish on the beach like they had in the past. So those things change. Our recommendations in the Yurok-Hoopa split were that the Yurok Tribe would be allowed to continue their gathering, hunting, and fishing on State park beaches, which was their natural territory. That was deleted.

The Redwood National Park is 100 percent in Yurok territory, traditional aboriginal Yurok lands, so they worked with us. But for some simple reason, now again their director has changed and they are sort of backing off on some of the things that they had agreed upon.

So in this recommendation part, our recommendation is that we have that same policy for all those agencies so that the Indian people, regardless of what tribe or where they are in the United States, will have something that they can see that will have to be abided by. We have been talking about this directive, "carry out the legal responsibilities of the Federal Government." You know, the Forest Service's job is to carry out the legal responsibilities that the Government tells it to do. We, as Indian people, feel that the Government has to carry out the legal responsibilities that it has to us as Indian people, and that is the protection of our rights, see?

When the white man first came to the coast, we were 100 or 125 years conquered—not conquered, but we met these people that many years after they did here and in the central part of America—when they came through, they were destroying our culture and our religion at that particular time. They were raiding and stealing all the traditional Indian regalia. They were taking all the stuff, not allowing the Indian people to participate in their culture. That was how they were going to try to conquer us, okay? In some parts they used smallpox.

We sit back here today and we say that we're citizens of this United States, but we're still not protected. So in a sense we would say that citizenship to us is just like smallpox back in the 1800's. It is still trying to destroy us. It has no respect for us.

So if the Congress said back in the 1800's that we were wards of the Government, that they were our trustee, that they were supposed to take care of us, then they should take care of us and our culture, fulfill that agreement of their forefathers and not destroy us. Leave our spiritual ceremonial areas alone. That is what we would like to see.

The last part, "take the route that doesn't affect you." Every bit of it affects us.

Mr. **Parker**. Thank you very much.

Before proceeding with the next panel I would like to ask if minority counsel has any questions on behalf of Senator McCain.

Eric.

Mr. **Eberhard**. Thank you, Mr. Parker.

I think that rather than ask questions at this time, other than just one or two to each one of you, I would like you to know that we will be sending to you written questions, the same as we will many of the other witnesses, during the next week. We would appreciate it if you could get your written responses in to us as promptly as possible so that we can close the formal record.

[Information to be supplied appears in prepared statements in appendix.]

Mr. **Eberhard**. I would like to assure all of the witnesses, but particularly Mr. Lara, that any suggestions that you have for changes in the bill will be received at any point. I will be happy to work with you on particular language changes, to consider those. I am sure that both the chairman and the vice-chairman would express that sentiment to you.

Mr. Snake, for the record I want to ask you the same question that I asked the witnesses from the Navajo and Hopi Nations. Have you had any contact with the National Park Service with regard to the ethnographic data base that they are compiling?

Mr. **Snake**. None whatsoever, Mr. Eberhard.

Mr. **Eberhard**. What Federal agencies have you dealt with with respect to protection of your practices or sites?

Mr. **Snake**. Well, in relation to our own planning for the future of our tribe, we have had discussions with the U.S Army Corps of Engineers concerning lands along the Missouri River that we own.

As the President of the National Congress of American Indians, we did have a meeting here in Washington, D.C.—I think it was with Region 8 of the U.S. Forest Service—concerning repatriation of Native American remains and burial goods. That has about been the extent of my personal involvement with any Federal agencies.

Mr. **Eberhard**. When you dealt with the Corps of Engineers on behalf of your tribe, what was your experience with the Corps?

Mr. **Snake**. Well, I think some of you have heard the story of the creation of the "Winnebago Navy." Originally we started out with some very intense feelings about the Corps of Engineers back in 1970, but through the Federal court system and through a process of education we have a new relationship with the Corps of Engineers. At this point in time they are much more cooperative than they have been in times past.

Mr. **Eberhard**. Are you aware if the Corps of Engineers has any specific regulations that require their personnel to consult with tribes or native people with respect to Corps projects on lands that may contain sacred sites?

Mr. **Snake**. I believe there are such regulations in the Corps, yes.

Mr. **Eberhard**. Mr. Mayo, I was very interested in your comments about the language relating to indispensability. I wonder if you draw any distinction between that language and what the courts have developed, which is sometimes called the "centrality doctrine" in their review of claims which have previously arisen under the American Indian Religious Freedom Act. Are you familiar with the concept of "centrality" as the courts have developed it and applied it?

Mr. **Mayo**. No, I am not.

Mr. **Eberhard**. Okay.

Mr. Lara, I wonder if, based on your experience—and I know that you are not only a practitioner of your traditional beliefs, but that you are also a logger, that you use the forest in many ways—but I wonder if in your view there is any way in a statute of this kind to create exceptions by which Federal land managers can proceed with development while respecting native practices and uses of those lands?

Mr. **Lara**. You want to know what they could do to what?

Mr. **Eberhard**. Is there any way to find a balance to respect your right at the same time that development proceeds? Is there any way to find that balance in your view or in your experience?

Mr. **Lara**. In the balance, if they were to log in the area a distance away from the ceremonial area itself and not build roads through that area to get the logs out, that would be a balance. But it would have to be away from the spiritual and ceremonial area. They could do that with the helicopter. They helicopter logs with big cranes. It may cost twice as much for the fuel, but as I understand the Federal Government, the National Forest Service subsidizes those helicopter logging companies to log that. So if they have to pay them to log it, why don't they just leave it there? I mean, that's being mad about it. But there is a way that they could do it, right. But it would be expensive.

This was the situation with the G–O Road. They could have gotten those logs out of there east or west; they didn't need to put the road through there because they had roads going out and coming back, over Happy Camp, and they had another road going over Orick Hill. And they had a road coming in on the west side, just a few miles from Doctor Rock. So the whole area was covered.

Mr. **Eberhard**. Thank you, Mr. Lara. I thank all of you for taking the time and the effort to be here with us today.

Ms. **Zell**. Before we proceed with the next panel, in Mr. Parker's absence I would like to identify myself for the record. My name is Patricia Zell and I serve as Chief Counsel of the committee.

For the last panel we would call Mr. Michael Woodruff, an attorney representing the Christian Legal Society; Ms. Mahealani Ing, Executive Director of the Native Hawaiian Legal Corporation; Mr. Reid Chambers, an attorney from Washington, DC; and Mr. Scott Matheson, an attorney from Salt Lake City.

Mr. Matheson, would you like to proceed?

STATEMENT OF SCOTT M. MATHESON, ESQ., ATTORNEY, PARSONS, BEHLE & LATIMER, SALT LAKE CITY, UT

Mr. **Matheson**. I am very happy to make my comments. My name is Scott M. Matheson. I am an attorney, practicing law in Salt Lake City. In this matter I represent 15 organizations that are multiple users of public lands, and I am appearing representing them.

I have submitted a very long statement, for which I apologize, and with your permission I will try to summarize it very briefly.

First of all, I would like to indicate to the members of the staff and to you, Madam Chairman, that even though I am appearing in opposition to S. 1124—and we are convinced, and I hope our testimony can sustain the fact that we do not believe this bill is in the public interest the way it is presently drawn—we don't want to leave any impression of any hostility, unsympathy, or disrespect for the religion or the religious practices of any Native Americans. I think that is important because I think we all want to see a fair result, so I want to begin by making that first comment.

My summary will include a brief discussion of two basic reasons why we think the proposed legislation, S. 1124, is flawed.

The first reason is based on policy, and that policy is made up of a whole series of concerns. The first is that while we examine S. 1124 in its benign and fairly short size, we think it is a real blockbuster as we evaluate the scope and impact of it because even though it may appear to be a limited bill to protect religious freedom of Native Americans, in our opinion it goes far beyond that. We believe that its impact will have a serious disruption on the management of Federal public lands across the country. I say that that will particularly occur in the west, where the Federal land has most of its public acreage at this time. My State, for example, is two-thirds owned by the Federal Government today.

Second, as we read this bill there is a preemption by its nature which puts a veto power in the hands of Native Americans over all Federal land decisions through the process created by section 3(a) of the bill.

Thirdly, we think the bill will create a de facto religious property right on Federal lands for Native Americans on the basis of those religious claims, basically in the nature of the discussion in the Lyng case. We think that there is enough ambiguity in the bill today to spawn a whole series of lawsuits as the conflicting interests keep attempting to sort out the bill's meaning and its application.

We have attempted in the testimony, which is on file and which you have accepted for the record, to outline a whole series of examples of that, and I won't attempt to get into them at this particular time. I would observe, though, from our analysis across the country from situations of this type existing today, that we are already doing a pretty good job of clogging up the Federal court system in trying to solve these problems.

We are concerned that the bill will adversely impact the rights of non-Indian users of Federal lands, as well as the rights of Indians who do not practice a traditional form of religion.

On the policy side we think that the bill is much too broad. It says "all Federal land." I know we've talked about the three land agencies, but the bill is much broader than that in its words. It is also very broad in its impact with respect to the scope of its application for the practice of Native American religions or religious practices because it applies to "all lands that have historically been considered sacred and indispensable to Indian religions." As you know and as we all know, that covers literally thousands of sites in the public lands of the United States.

Finally, there is a serious question in our minds as to whether the bill is really necessary. I realize that AIRFA does not provide a cause of action in the courts, but over the years, if you will examine the daughters of AIRFA, I think it is fair to say that there is a whole series of Federal statutes, a whole series of Federal regulations, a whole series of land management manuals, all of which are directed toward maintaining the integrity of addressing this particular problem.

The second main reason why we are concerned about this bill is the Constitutional issue regarding the establishment clause. In our view, the bill almost certainly violates the establishment clause as it is now drafted.

Let me begin for just a moment and talk about this veto issue. Because only Native Americans can say what their traditional religion is, what their traditional religious practices are, and where those practices take place, they are capable of claiming literally tens of thousands of sacred religious sites on Federal public lands of this country. Additionally, only those people, as practitioners of those religions, will be able to decide when or what other activities will interfere with or—and this is in the statute—"pose a substantial and realistic threat" to their religious practices.

As evaluated in the dissent in Lyng, there is really no way to evaluate that. We take that as genuine, in good faith, and factual, and I think we should. But that being the case, there is really no one who is in a position to challenge a claim of interference or threat to that practice because no one else can say what conditions those religions require. Consequently, Native Americans will be in a position to veto any activity on Federal land which they deem a "substantial and realistic threat to their religion or religious practices."

We think that is going to cause some real chaos in Federal land management by its unpredictability and its uncertainty. We think that the veto power will be absolute and unqualified because religious claims cannot be disproved. The bill appears to provide for some limitations on that power, but in reality, in our opinion, they would be ineffective. In particular I point to the so-called "compelling Government interest" language. That requires proof of interest of the highest order with no other alternative. The cases from the Supreme Court say that that standard is so high that I do not believe that in the normal case of multiple use on the land, that standard could be met. Certainly, the Lyng case is an example of a case that could not.

I would like to talk about the establishment clause for a minute. When I was asked to testify, one of the council members said that was an important matter for this committee, and obviously you have taken it seriously. Because of the nature of the issue, that is a very critical factor.

We think that by creating a special protected status and preferential treatment just for traditional Indian religions on Federal land—by the way, benefits not enjoyed by any other religion—S. 1124 violates the establishment clause of the First Amendment. The application to just one religion, and really just one type of religion, in our opinion makes it incurably unconstitutional. That's the core meaning of the establishment clause because Government can't favor or give preference to any particular religion. Any such favoritism simply and obviously violates the establishment clause of the Constitution. It is simply that clear.

I point to the Larson case from the Supreme Court in 1982, which holds that the prohibition is absolute, and the Epperson case in 1968 from Arkansas.

The only way that we can get around the establishment clause, as I see it, in getting away from this core vitality which is preemptive in my view, is to examine a situation which would be applied to all religions of every type and give priority use rights to Federal lands to any and all of those religious practices. In other words, not limit it to just one religion. And then we get into the famous "Lemon test," and that is a matter which will be discussed and has been discussed in the Congressional Research Service, and I am sure in other testimony today. But under Lemon, it is Constitutional only if you have a secular purpose, that the effect is not to advance or inhibit religion, and it must not excessively tangle our Federal Government in the religion or religious practice.

Now, if you examine S. 1124, I think it is fair to say that the bill's primary purpose is simply not secular but religious. Indeed, it is narrowly and discriminatorily religious in that it is addressed to only one traditional Indian religion. As to advancing a religion, obviously it is to advance one particular type. And third, when the land managers and the Indian tribes begin trying to sort out exactly what that religious practice is under this bill, I can anticipate and see a lot of entanglement.

So we think the establishment clause, from a Constitutional basis, is a serious impediment, along with those policy reasons.

Two final points, Madam Chairman. We see a disruptive impact on the public land throughout the country in this case. Remember, it affects all Federal lands. I happen to come from a State where our State lands are surrounded by Federal lands, and I can foresee very easily through the permit system, through inholdings, through selections, and through the checkerboard system that State lands could be impacted adversely without any more legislation than the bill we're talking about. It certainly affects our west, because that's where most of the public property owned by the Federal Government is located. I think it is fair to say that it will affect large amounts of important natural resources, which are the economic livelihood of millions of people who make that living from using public lands, and this would be a serious detriment and effect on that practice.

We think the impact will be disruptive because Native American religious claims are absolute, and we think it would be disruptive also because it will allow Native Americans access to Federal trial courts without exhaustion or participation in the administrative remedies which are now available. We have cited in the long-range testimony examples of how we think that could work.

Let me conclude by making three small recommendations and a conclusion.

We think that S. 1124 should be carefully considered before any further action takes place. I would recommend that we do the following research and give attention to these issues.

First, what is the bill's impact on Federal land management due to the absolute preemption on behalf of traditional Native American religious interests? I doubt that anybody has really analyzed and quantified that problem.

Second, what is the impact of S. 1124 on the productive and responsible development of the natural resources of our country? Is that an important public policy consideration? We think it is.

Have we done an up-to-date assessment on how the existing statutes and regulations and the land management plans actually work? Are those policies working to respond to the religious concerns of Native Americans? Shouldn't we examine how and to what extent the Native Americans themselves are willing to participate in an administrative process by providing the factual information about those religious concerns? Isn't it possible to quantify the size of the problem by finding out how many and where and the size of those religious sites and those religious practices as related to the public lands?

And finally, does a detailed analysis of the current problems with Native American practice under the current remedies—is that an adequate way to address the problem? You've had the Forest Service and the Park Service individuals here. They think that it is adequate. I'm not here to tell you that it is or not, but I can tell you that a number of statutes and regulations and plans have been put in place to make it work. Have we analyzed to see exactly whether it is or isn't working?

So we would conclude that the best approach in handling this particular problem is to maintain the integrity of the multiple-use concept, which we use on the public lands; accommodate all of the interests in that process; and cooperate thoroughly among all the parties. That, we think, is the best way to address this serious problem.

Thank you very much.

[Prepared statement of Mr. Matheson appears in appendix.]

Ms. **Zell**. Before we proceed with the next witness the minority staff director and counsel, Mr. Eberhard, has a question to ask you, Governor.

Mr. **Matheson**. Surely.

Mr. **Eberhard**. Governor Matheson, I am curious, because when I read your written testimony and the portion that I heard of it here today in your oral testimony, the conclusion that I reach is that it is your view that any legislative action by the Congress in this area would constitute a violation of the establishment clause; yet at the same time, you are urging the committee and native practitioners to continue to use what appears, from your testimony, to be quite a comprehensive regulatory scheme that has been put in place by the Federal agencies which, in your view, allows for Federal considerations relating to protection of native religious practices.

I wonder where you draw the line and why you don't find those regulatory practices to constitute a violation of the establishment clause.

Mr. **Matheson**. Primarily, I think, because the regulations and the statutes are not preemptive of the multiple-use practices on the land, and allowing the Native American practice to be exclusive. I think that's the main reason.

There are two bills that were adopted by the Congress which I have cited in the brief where that particular language was used, Mr. Eberhard, and no one questioned it and it seemed to be a good solution to the problem. I would advocate that that's a good way to go.

With respect to the establishment clause itself, I would say that in my view, as the bill is now drawn, it violates the establishment clause under the Larson case in the core sense.

Mr. **Eberhard**. If I could just follow up for a moment, what in S. 1124 prohibits multiple use of Federal lands? What specific provisions, if you will please identify them for the record—if not today, then in a subsequent submission, if you would—violate the principle of multiple use of Federal lands?

Mr. **Matheson**. I believe, as I explained in the veto section, the preemptive section——

Mr. **Eberhard**. Is the word "veto" used in S. 1124?

Mr. **Matheson**. No; my interpretation is that a preemptive ability to provide the Native American religion or the practice on the land is a veto and a preemption, even though it doesn't say that in the statute. "Veto," for example, is used in the Lyng case. It isn't a brand new word that I just thought up.

When you look at the basis on which you decide whether there is or is not a Native American religious practice, the only people who can decide that are the Native Americans who understand what it was and is. In the Brennan dissent we talk about accepting that at good faith and truthfully, and I am not here contesting that. Once having established that, then the McCain bill attempts to shift the burden back and forth.

My view is that once that is established, there is no provision in here that would allow the Federal Government to come in and set that aside because the only one that has any teeth, as I see it, is the one involving "compelling governmental interests." Under the Supreme Court decision in the Wisconsin case and others, the standard that you have to prove to really set that aside is so great that it wouldn't meet in terms of use of the public lands. That is how I arrived at that legal conclusion.

Mr. **Eberhard**. If I could just ask one further question, in your testimony you consistently used terms such as "veto," "preference," "priority," "religious property right," "right to exclusive use." Do any of those terms appear in this bill?

Mr. **Matheson**. No; they do not. They certainly appear in the Lyng case, and that's how I interpret the bill.

Mr. **Eberhard**. Thank you.

Ms. **Zell**. Governor, you indicated that you are not here to contest the determination by Native Americans of what constitutes a religious practice or a religion, yet in your earlier testimony you referred to there being a problem associated with Native Americans determining what constitutes a "substantial and realistic threat."

If not Native Americans, whom would you have determine what constitutes a threat to their religion?

Mr. **Matheson**. As a matter of fact, I am of the view that they are the only ones who can decide that.

Ms. ZELL. So what would you propose—if they are the only ones, what is the problem inherent in their being the determiners of what constitutes a threat?

Mr. MATHESON. That's another example. After that has been examined and the threat cannot be established, then you have no multiple use, the practice prevails, and the preemption argument is in place. So my view about it is that this bill violates the public policy arguments of allowing exclusive use for religious practices, when we ought to have multiple use instead.

I haven't gone back into the establishment. I won't try to respond to that again.

Ms. ZELL. Thank you, Governor.

Mr. Woodruff.

STATEMENT OF MICHAEL WOODRUFF, ATTORNEY, CHRISTIAN LEGAL SOCIETY, MERRIFIELD, VA

Mr. WOODRUFF. Thank you very much, Madam Chairman, members of the staff. I thank you for the privilege of testifying before the committee on S. 1124. May my written remarks, previously provided to members of the committee, be received and made a part of the committee record? I would ask that those longer written remarks be made a part of the record, and today I will just summarize some of the points I made in those remarks.

Ms. ZELL. Without objection, they will be included in the record in full.

Mr. WOODRUFF. Thank you very much.

I would like to make brief comments summarizing the written remarks, and then of course I would receive any questions.

The Center for Law and Religious Freedom filed a brief on behalf of the Christian Legal Society, the American Jewish Committee, and Concerned Women for America as amici curiae in Lyng v. Northwest Indian Cemetery Protective Association, the case before the Supreme Court. The brief supported the Native American respondents whose religious liberty interests were threatened by Federal land management practices.

I have read other testimony to the committee on other occasions, and I am sure this case is now very well known to the committee in detail. So speaking only on behalf of the Center and in light of the Lyng case, but not on behalf of the other amici in the brief, I want to make four major points in response to my review, at the committee's invitation, of Senate bill 1124.

First, Congress may amend the American Indian Religious Freedom Act to reconcile competing demands on Government for public land use management and accommodation of traditional Native American religious practices without violating the establishment clause. The Supreme Court in Lyng seems to have expressly left room for Congress to amend the act. There has never been any question in the Supreme Court's opinions that the act as it currently exists is unconstitutional. There has not even been a hint of that concern.

Congress may, in fact, address how demand in public land use management and accommodation of traditional Native American religious practices are to be reconciled, if Justice O'Connor's words are to be a guide. "Such a task," she wrote, "to the extent that it is feasible, is for legislatures."

Now, the Supreme Court tacitly, in my judgment, invited the Congress in that case to accommodate religious practices such as those that were at issue in that case:

> Nothing, in our opinion, should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents.

If the free exercise clause did not mandate the accommodation of religious practices on Government land in the Lyng case, legislation directed at the task of managing Federal land on which sacred sites are located in such a manner as to maximize accommodation of religious exercise is not, in my judgment, prohibited by the establishment clause.

The second point I would like to make is that the bill should not confer standing to sue on any person contrary to the Constitutional requirements of article 3. The proposed language in section 3(c)(1) apparently allows a civil action brought by any person. There is no limiting language to comport with the requirements of article 3's case or controversy requirement, and thus it indelicately intrudes on a separation of powers principle.

Careful consideration should be given by members of the committee to limiting standing to those persons who were injured or who are threatened with harm to their religious practices as a result of governmental action.

I think there have been other versions of the concerns in this bill that have more precisely focused the harm on this standing question. I am thinking of Senator Cranston's previous efforts in this area.

Number three, I would like to point out that legislative accommodation of Native American religious practices to protect sacred sites on public lands should specify the public access to such Federal lands to reduce establishment clause concerns. The bill does not distinguish between Federal land to which the public has access, and Government land to which public access is denied, such as land reserved for military use. Several years ago access to Vandenberg Air Force Base was sought by Native Americans. Such claims could be renewed, there or elsewhere, unless the bill makes clear what the intent of Congress is, and if the Supreme Court has left this matter to the determination, how exactly these interests are to be balanced. If there is to be an accommodation, then clearly Congress' intent should be specified and not left to some later adjudication on a matter on which guidance is not given in the bill.

So as the bill is presently worded, it simply identifies Federal land and sacred sites without differentiation for public or nonpublic access. I take it that is an area in which there could be some refinement.

Fourth, the Supreme Court unquestionably narrowed the free exercise rights of Native Americans in the ~~Lyng case,~~ but Congress has the opportunity to provide legislative accommodation in furtherance of important free exercise values. A majority of the Supreme Court in the Lyng case held that the free exercise clause did not prevent Government action from virtually destroying the Indians' ability to practice their religion. The Constitution only protects individuals from being coerced by Government into acting contrary to their religious beliefs, if Government action is not otherwise justified by a compelling interest, the Court said.

It seems to me anomalous for Congress, in the interest of accommodating free exercise values, to have within its power the opportunity to provide more protection for religious practice by legislation than the Supreme Court can provide through the Constitution, but that's the opportunity.

I thank you for the opportunity to share my views with the committee.

[Prepared statement of Mr. Woodruff appears in appendix.]

Ms. ZELL. Thank you, Mr. Woodruff.

Ms. Ing.

STATEMENT OF MAHEALANI ING, EXECUTIVE DIRECTOR, NATIVE HAWAIIAN LEGAL CORP., HONOLULU, HI

Ms. ING. Good afternoon, staff members of the committee. Thank you for allowing me this opportunity to present testimony relating to S. 1124.

I want to say at the onset that we believe this legislation is a step in the right direction, but my testimony will be substantially in opposition to it because we feel it doesn't go far enough.

Also, my written statement will be mailed to you. I apologize. I will be reading from an oral presentation that I only prepared last night. My apologies; I've had an extremely busy week, but a written statement should be forthcoming within 1 week from my office in Hawaii.

I would like to begin by briefly describing the context within which the Federal Government claims jurisdiction over any Hawaiian lands at all. Briefly, less than 100 years ago the Federal Government took almost 2 million acres, which represents one-half of the entire State of Hawaii, from the Kingdom of Hawaii without any compensation to its native people. When Hawaii became a State, all but 400,000 acres were transferred to the State of Hawaii under a trust responsibility, that the revenues from these lands—as well as the lands themselves—might be used to benefit the native people.

The 400,000 acres that have been retained by the Federal Government are today used primarily for military purposes, as well as some Federal National Parks.

I thought that as I presented my comments today, I think it is important that this committee as well as the members of the audience present understand that the native people are seeking return of those lands.

As introduced, I am Mahealani Ing, Executive Director of a six-attorney public interest law firm called the Native Hawaiian Legal Corporation. Many members of the committee are already familiar with our work, which is to assert, defend, and protect Native Hawaiian assertions to land, natural resources, and related entitlements.

We have been regularly consulted by this committee, as well as other Native American groups, even prior to the enactment of the original bill in 1978. One of our Board members, Randolph Kalahiki, served as a member of a national advisory committee which sought this legislation over 10 years ago.

I would like to talk briefly about the instances in Hawaii where Native Hawaiians have been confronted with challenges to the exercise of their religious freedom.

The native claims in Hawaii initially have arisen in the context of access to sacred lands. In the case of *United States* v. *Mowat*, several members of the Protect Kaho'olawe Ohana—Kaho'olawe is an island which has been used for bombing practice since World War II; the word "Ohana" in Hawaiian means "family"—the Protect Kaho'olawe Ohana members were charged with trespassing upon Kaho'olawe Island, contrary to Federal statutes and regulations. Based on these regulations, access onto Kaho'olawe was banned without advance consent by the Commandant of the 14th Naval District. The defendants claimed access based upon free exercise of religion; however, the court in that case concluded that requiring advance approval before entry was not unreasonable, as the island was used as a target for bombing practice, and the threat of explosion from live ordnance would put trespassers at risk. This risk, therefore, was deemed to outweigh any burden upon the free exercise of religion.

The case did not specify exactly what religious ceremonial activities were to be practiced on the island by the defendants, but the religious, cultural, and historic significance to Native Hawaiians is similar to the claims made by Native Americans in the cases of *Bedoni* and *Sequoyah*, two cases which dealt with Indian sacred lands.

In the Kaho'olawe case in Hawaii, a consent decree was signed by the parties in interest, such that limited access for a certain number of days every month was allowed. However, to this day the Navy continues to use the island as a bombing site, notwithstanding the fact that there are between 89 to 100 sites which are on the Federal Register and recognized. They still continue to destroy and bomb our religious sites today. We have not been able to invoke any law to protect our religious rights on that island.

You may have copies of my longhand testimony. With Kaho'olawe, the court concluded that compelling Government interests in keeping outsiders off of dangerous land outweighed any burden on the defendants' free exercise of religion.

In the case of *Aluli* v. *Brown*, Kaho'olawe was again at issue. There the plaintiffs sought to stop the military from bombing the island to prevent further destruction of archaeological sites which had religious and historical significance to Native Hawaiians. Although the Federal District Court denied the injunction, it held that the military was required to file annual environmental impact statements pursuant to the National Environmental Policy Act.

That has not been a very meaningful remedy. The filing of an EIS merely states the case. It merely describes an ongoing practice of continuing to use the island as a bombing site. So it is not viewed by native practitioners of the Hawaiian religion to be a meaningful remedy at all.

The court concluded in that case that bombing archaeological sites might be harmful to human beings. We don't consider that very meaningful.

Following up, the next case, *Dedman* v. *Board of Land and Natural Resources,* our office represented Native Hawaiians who challenged a decision permitting geothermal drilling in an area significant to native religious practitioners who honor the deity Pele. We also call her Tutu Pele, "Tutu" meaning "grandmother" in Hawaiian.

The proposed development has impinged on the right of Pele practitioners to free religious exercise, since geothermal development requires drilling into the body of Pele and sapping her energy and lifeblood.

The Hawaii Supreme Court acknowledged the sincerity of the religious claims at issue. It then considered whether the approval by the Board of Land and Natural Resources of the proposed geothermal development would unconstitutionally infringe upon Native Hawaiian religious practices. On this question, the court found controlling the absence of proof that religious ceremonies were held in the area proposed for development. In other words, they required site specificity, which could not be demonstrated by our practitioners. Without evidence of a burden on the free exercise of native religion, the court did not reach the compelling State interest question. Accordingly, the court concluded that no free exercise clause violation had occurred.

The Dedman court's application of a narrow analysis of free exercise infringement accounted for its failure to find any burden on Native Hawaiian religious practices. Under the court's view, a burden on the free exercise of religion exists when Government action regulates or directly impinges on Native Hawaiian religious practices. Furthermore, only Government conduct which compelled irreverence of religious beliefs or penalized individuals for their religious actions would warrant free exercise protection.

Few practitioners of native religion can meet this standard. Such a constricted approach consigns free exercise protection to the far end of a rapidly-diminishing spectrum of native rights.

The free exercise clause of the First Amendment guarantees to Native Hawaiians the freedom to practice their religion. In so stating, I strongly disagree with the testimony presented by Governor Matheson. I believe that what Native Americans desire is just the equal protection afforded them under the Constitution. To Native Hawaiians, this means the freedom to practice a way of life involving a unique form of worship, centered on a highly-developed mythology and a code of conduct. The scope of free exercise protection, however, depends on the court's interpretation of the free exercise clause. Such interpretation has a long and varied history. I give a short overview of the development of cases under the free exercise clause, which basically have gone from a dichotomy between belief and the actual practice, to requiring the State to demonstrate a compelling State interest, to a point today, pursuant to the *Lyng* case, where the burden is on the practitioner to show that there is no undue infringement.

The express purpose of the American Indian Religious Freedom Act was to require that Federal policies comply with the Constitutional mandate of the free exercise of religion. Section 2 of the act illustrates this purpose by instructing Federal agencies to consult with native religious leaders concerning the changes in policies or practices necessary to preserve traditional religions.

Despite its Congressional directive to safeguard traditional religious practices, AIRFA has afforded little protection.

Again, to spare this committee, I have presented short summaries of the cases in which AIRFA has been of little help. Some of these cases have been attested to by earlier witnesses.

Finally, with all due respect and in consultation with native practitioners in Hawaii, we do not believe that the amendments proposed in S. 1124 will correct AIRFA's shortcomings. For one thing, available exemptions are overboard. I cannot think of one Federal management decision which cannot be construed to be "necessary to carry out the legal responsibilities of the Federal Government," thus qualifying for an exemption. The two remaining exemptions, which are "protecting a governmental interest" and "protecting a vested property right," are already strongly supported by the free exercise clause in the cases which were interpreted today. Frankly, these amendments would appear to exacerbate the problem rather than correct it.

Further, language that would suggest that the Federal agency attempt to accommodate various competing interests and pick the course of action least intrusive somehow does not have the ring of First Amendment Constitutional rights to it. The lofty and paramount Constitutional right to freely exercise one's religion is relegated to some base type of political expedient, which we find unacceptable.

Last, I have participated as a Native Hawaiian in religious services at Volcanoes National Park. We have had to endure gawking tourists and insensitive park personnel. Therefore, I think there are times when there needs to be exclusive access only by native practitioners.

For these reasons we cannot wholly support S. 1124 although, again, we feel it is a step in the right direction. Thank you.

[Prepared statement of Ms. Ing appears in appendix.]

Ms. ZELL. Thank you, Ms. Ing.

Mr. Chambers.

STATEMENT OF REID CHAMBERS, ATTORNEY, SONOSKY, CHAMBERS & SACHSE, WASHINGTON, DC

Mr. CHAMBERS. Counsel Zell, Counsel Eberhard, thank you for inviting me to participate here today. I have also submitted a written statement, and I will try to just summarize it here in a few moments.

First, I want to address the Constitutional power of Congress to deal with Indian affairs, because I think that the Establishment Clause issues must be considered in the context of that power.

The constitutional power of Congress dealing with Indian affairs—I don't need to tell any of my colleague lawyers up there—is extremely broad. It is rooted in the Commerce Clause. It is rooted in the treaty power. There are some historical antecedents, even in the war power and the public property clause. There is only one case in the history of the United States that has ever held an Act of Congress exceeded the constitutional power of Congress, when it is legislating with respect to Indian affairs.

Modern cases talk about an act of Congress being constitutional if it is uniquely tied to the obligations of trust that Congress bears to the American Indians. It is hard for me to conceive of legislation more directly tied to the obligations of trust that Congress bears to American Indians than S. 1124.

Now, the cases dealing with the trust responsibility, as the committee knows, have dealt mostly with property rights—water rights, rights to hunt and fish, rights to timber, rights to minerals—not just land. But the trust responsibility is not limited to property that Indians hold today, nor is it limited just to commerce with Indians. The purpose of the trust responsibility was expounded by Chief Justice Marshall 160 years ago, in the Cherokee cases. The purpose is to allow Native American communities to maintain a distinct political society.

Now, the Supreme Court has said that Indian tribes are not simply private voluntary organizations, they are governments and communities. A distinct political society encompasses more than just a government. It encompasses a culture, and a religion is but a part of that distinct political society. So this legislation is carrying out the trust responsibility further than you carried it 10 years ago, when you enacted AIRFA to protect religious sites of American Indian tribes and their members. The courts really haven't implemented the act as Congress intended it 10 years ago. It seems to me that that's within your Constitutional province.

Congress could, for example, establish an Indian reservation on each of those religious sites today. You could set aside religious sites, like San Francisco Peaks or the area around the G–O Road. You could set those aside as an Indian reservation. You've done it recently. You've done it recently with Taos Blue Lake when the Forest Service was mewing piteously about how it needed those lands for a forest.

So there is no question that you have the constitutional power to set aside sites for exclusive use of Indians. And I shouldn't think there would be any question that you would have the constitutional power to take a lesser step, which is to allow American Indians the non-exclusive use of those sites as you determine. And that's what this bill seems to me to be designed to do.

Obviously, you don't have the power to avoid First Amendment rights, or exceed other constitutional restrictions, so I want to address the Establishment Clause. I agree with Governor Matheson that the *Lemon* case best sets forth the standards for the Establishment clause—the "secular purpose and effect" standard, for example.

In enacting legislation to protect the trust responsibility, I suggest to you that you are carrying forth a secular purpose and effect of the most extraordinary importance, the protecting American Indian tribes and their societies and their distinct political communities. That's the secular purpose, that's the secular effect of this legislation.

Now, on the issue of preferring Indian religions over other religions, I agree—and here I am going to refer to my statement—with

Governor Matheson that the Supreme Court has established that the clearest command of the establishment clause is that one religious denomination cannot be officially preferred over another. It said that in *Larson* v. *Valente*, which the Governor referred to. It said similar things in *Zorach* v. *Clauson*.

I suppose it would be odd if two lawyers agreed completely, but I do disagree with Governor Matheson that Indian religions are in any way preferred over other religions by S. 1124. S. 1124 addresses a very different problem that traditional Indian religions are burdened—indeed, are threatened with destruction—by practices of Federal agencies on public lands in ways that other religious denominations and other religious practices simply are not imperiled. That's because, as the bill's findings state, "many Indian religions are site-specific."

Indian religions view man and nature and deity as intertwined in a natural place, and they focus on the spiritual renewal process through an individual's relationship with a particular holy place in a way that western religions simply don't. Ms. Ing says, to practice her religion, she is going to be gawked at by tourists. She has to deal with insensitive, ethnocentric park personnel. In these circumstances, the religion can't go forward. The religious experience is imperiled.

In passing S. 1124, you would simply be accommodating the programs and operations of the United States on the public lands to the religious needs and interests of Indian people, to their culture and their society. And that would allow Indians the same rights to exercise their religious practices that other Americans enjoy. The Government is not aiding a religion; it is not financially supporting a religion; it is not endorsing any particular Indian religion. It is simply abstaining from interfering with Indian religious practices, unless it has a compelling reason for doing so.

Religious autonomy is the central purpose of the First Amendment. We have had as graphic testimony as I can imagine by witnesses today—I am thinking of Mr. Lara in particular now—about how his religious autonomy was affected by the Government's trivial purpose of building the G–O Road through the lands in which his religion and the religion of his ancestors and the religion of his people is practiced, and threatens to destroy his religion.

Now, the Supreme Court has spoken on whether that's technically within the Free Exercise Clause. I don't think it is up for debate. But the idea that the Establishment Clause is the second scissors that prohibits Congress from acting seems to me to be a perverse reading of the Establishment Clause. Sure, I think that probably the founders, Madison and Jefferson and those great minds, did have in mind a complete separation of church and state. But they also dealt with a government that was much less pervasive in its influence on the lives of American citizens than our Government properly is. We can't run a Government in the late 20th century like the government in the late 18th century. They didn't have a government that was going out and developing all the lands in the country and imperiling all the sacred sites of the Indian religions in the country. That is what we have now, and I think that Indian religion has to be accommodated by that kind of Government.

Now, I am concerned—and my testimony sets this forth—with the third standard, the entanglement standard—the Government getting entangled in religion. But my concern is from a different perspective than some of the other witnesses. I think there is some danger in the way the bill is currently drafted, that it can enmesh Indian religious practices in administrative regulations. I am concerned that a federal agency, inquiring into matters such as whether a particular site is "indispensable" to an Indian religion, or whether an Indian religion is "traditional," could impermissibly entangle the Government with religion.

So for that reason I would urge you to reexamine the bill and consider simplifying its standards. In my view it should be sufficient to invoke the bill's protection if a tribe or an Indian religious group certifies that a particular site is central to its religion, and the agency determines that the certification is sincere, genuinely held, made in good faith. Once that has been made, I don't think the agency can inquire beyond that into these other questions like indispensibility. I think maybe a court could, but I don't think an agency could and I don't think an agency should.

I don't think that gives a veto, though, to Indians over development because you still have the three other standards that you have put forth in section 3(b).

I think one of the standards is somewhat vague, and Counsel Eberhard and I were discussing that over the weekend, but the concept is that if Congress by specific statute has said to an agency, "Look, you need to do this, that, and the other thing," then that is sufficient to override a balancing test.

The second standard, the compelling interest standard, is a balancing test. The Tenth Circuit in the *Baldoni* case held that it was a compelling interest for the Government to build the Boulder Canyon project dams and to flood out Rainbow Bridge. I might disagree with that, but I don't think the compelling interest standard just can't be met in any case. It's a balancing test and the Government has to show a very strong interest, one that I think unquestionably didn't exist in the G–O Road situation. The Government is coming in here now and saying that its procedures are sufficient. The inaccuracy of that is shown by the G–O Road case. Nobody can say that that road had any compelling purpose behind it. And I think that the religious values that it intruded upon did have a compelling purpose, and I think that's why you need a bill like this.

My only concern, in reading the entanglement cases over the past few days, is that if you get the Government too deeply into enquiring into whether a religion is traditional, whether some practice is indispensable to that religion—if you get a Federal agency doing that—I think you could be involved in impermissible entanglement. So please give that a look.

Thank you for the honor of appearing before you today.

[Prepared statement of Mr. Chambers appears in appendix.]

Ms. **Zell**. Thank you, Mr. Chambers.

Mr. Eberhard.

Mr. **Eberhard**. Thank you. I thank all of you for the excellent testimony. I should note that Senator McCain has said repeatedly about this bill, that it is intended to provoke thought and discussion. I think this panel in particular, but everybody who has testified today, has shown that at least that much of his purpose has been accomplished. There has been a good exchange, a lot of thought, and some good discussion.

I know that many of you had to travel a long way to be here, and I know that he regrets that he could not be here to hear you personally. But you can be assured that those of us on staff will make sure that he knows, at least in a summary way, what your testimony was.

I can also tell you that, knowing him, he will be taking it all home and reading it. I'm going to be getting a lot of midnight phone calls, "What does this mean?" and, "Why are they saying this?"

Ms. Ing, I would basically like to ask you the same question that I asked Mr. Lara. I thoroughly understand and appreciate what you are saying, but I have to wonder aloud and ask you to try to work with us on this, how do you find a balance? I understand the need for some exclusive use in some places, and perhaps total exclusive use in some places. How do you balance that with multiple use of lands that are now regarded as public in character, that once were used solely and exclusively by natives and subject solely and exclusively to native control?

Ms. **Ing**. Hawaiians today are a minority in their homeland. We have been inundated with westerners and tremendous development. Today we have the added burden of huge sums of money being poured in by Japanese development.

That is my way of telling you that I have never felt necessarily compelled to balance anything, but to be as zealous and as strong an advocate as I can be on behalf of the native people because 90 percent of the advocates today in Hawaii represent the other side.

This is not really a direct answer to your question, but your question to me, in my capacity as director of the legal office which serves Native Hawaiians, it's not appropriate for me to tell you how to balance it because I can only see our side, frankly. We have really suffered.

I leave it to the monied interests and others to figure out how to balance things out. That's my position.

Mr. **Eberhard**. Thank you.

Mr. Woodruff—and I want to ask Governor Matheson this same question—I don't read S. 1124 as delegating Congressional authority to Indians or native people. I was intrigued in reviewing your testimony, Governor Matheson, about that point of view.

I wonder, Mr. Woodruff, if you would take a moment to reflect on S. 1124 and share with us a response, if you have any, now or in writing later, on whether the bill in any way delegates Congressional authority to tribes or native people with regard to the religious freedom issues and practices.

Mr. **Woodruff**. I would be happy to give that further consideration. I think at the surface, the initial concern would be how such sites are designated and the quantification of those sites. That is some type of a process, I think, that has to engage the attention of Congress in this whole process of determining how those whose religious practices are burdened can appropriately identify that burden for redress. I'm not sure that the bill does anything other than provide a remedy in a U.S. District Court if the appropriate agencies were nonresponsive to written requests and other forms of communication about that burden.

I am not sure that the discussion has involved the kind of procedural due process or the methods by which those burdens can be properly identified. In fact, the suggestion from the Park Service seemed to be that this is an area that is totally undeveloped or yet to be determined, so I think we are looking at not necessarily a delegation of power or authority from Congress, but a mechanism by which the harm and the burden is somehow quantified so that the appropriate response on the part of Government can occur without the necessity of litigation.

The cost of litigation in today's society, one might add, is such that any help and consideration that Congress and the staff would give to intermediate mechanisms short of litigation would be of immense help in redressing some of these problems. It may be that a closer look and review of the kinds of standards that would be applicable at the regulatory level is going to be critical to put within reach of the religious practitioner a true accommodation, because even if you say, "You can resort to the courts," it may be a matter of financial inability to process such a claim.

Now, that's a little bit off the point, but my main point is that I don't see in the bill itself anything that would expressly delegate Congressional authority. On the other hand, this whole process of identifying and quantifying the scope of the harm could be seen as something outside the reach of Congress, but I think that is an invitation to a process that is kind of "sublitigation" for those agencies that are directly involved in the management of Federal lands to be sensitive to and to be able to process according to appropriate and objective standards.

Mr. EBERHARD. Governor Matheson, would you care to respond to basically the same question and help us out here? What is being delegated in your view, impermissibly or otherwise?

I should tell you that my reading of the bill is that nothing is being delegated, and that is why I am posing this question. I would like to know what you think is being delegated.

Mr. MATHESON. I guess I would begin by suggesting that in reading the bill, I really sense that a lot of homework by a lot of lawyers—I assume some of them are sitting up here in front of us—they spent a lot of time reading the Brennan dissent, and I think the ideas of how to deal with that situation are sprinkled through some of the language in the McCain bill.

But there is nothing in this bill that removes the exclusivity of the ultimate determination in my view, as I interpret the bill, on the part of the Native Americans who assert in good faith, and the Federal Government accepts, the establishment of a religious practice or a religious site. I think then we argue back and forth on the burden of proof and these other factors. I do not see that that leaves the multiple use concept in place. In fact, if you will remember the legislation on the Mono Basin National Forest Scenic Area, Congress actually placed non-exclusive access into that bill. And then in 1987, in the El Malpais National Monument Act, they did the same thing. So that issue is not hanging out, and the arguments in the Lyng case, the majority opinion, indicate that that is a real concern. I see that concern, and that's how I interpret that legislation.

I think there is a preemption and a beneficial property right capability in this bill for Native Americans the way it is drafted.

Mr. **Eberhard**. What Congressional authority is being exercised?

Mr. **Matheson**. Well, I'm not sure that I follow you on that, but perhaps we can visit informally about that. I would be happy to make it as clear as I possibly can at any time.

Mr. **Eberhard**. Thank you. And if you would like to provide any additional formal statements on that point, please feel free to do so.

Mr. **Matheson**. All right.

Mr. **Eberhard**. Mr. Chambers, I know from your years in Indian law that you are very familiar with AIRFA as it was originally passed, and I am sure that you are familiar with the cases that have been reported out of the Federal courts over the years. If Congress basically leaves the law where it stands today, following the *Lyng* decision, would it be your view that there is any effective protection remaining under AIRFA for Indian religious practices on Federal lands?

Mr. **Chambers**. Well, I don't want to say there would be none, Mr. Eberhard, but I think it would be really scant. You know, at least as well as I do, the cases have not been encouraging on that. So I think the only protection Indians would have would be whatever they could get out of the agencies.

Now, that has not been as much as Indian tribes and their advocates would like. I don't question the good faith of the agency personnel who came up and testified here earlier this afternoon; there are attempts being made, but they are being made in the context of agencies that are not really set up to accommodate these kinds of interests.

To me, it goes to the centrality of religious practices and values in our society. I think Congress has to do more to protect those practices and those values in this non-western religion kind of context.

Mr. **Eberhard**. In the context of the Establishment Clause in the "entanglement doctrine," if you will, of the *Lemon* case, you heard the testimony of the Federal officials earlier this afternoon. I'm sure you've heard testimony of other Federal officials on other bills, either now or in previous Congresses.

The question is one similar to the one I asked Governor Matheson a while ago. I am curious, with respect to the Establishment Clause and the entanglement issue, where do you draw the line? According to Federal officials, we have regulations and a substantial amount of Federal activity, apparently, underway on a daily basis with respect to Federal land management decisions and evaluating native and Indian claims to religious sites and practices on Federal land. That's ongoing, and there seems to be no question in anybody's mind that that's well within permissible constitutional standards. Yet at the same time, concern is raised that S. 1124 seems to go beyond that.

Where is that line? Why does S. 1124, in your view, perhaps go beyond it? Again, if you want to take some time and reflect on that and submit it in writing, that would be fine.

Mr. **Chambers**. You know, Mr. Eberhard, with all respect I thought your question to Governor Matheson was unanswerable on that point. I must say that something like that was brewing in my mind, but I didn't state it as articulately as I thought you did.

Mr. **Eberhard**. Surely you will see that the committee has to look at that question in order to evaluate the concerns that are being raised before us.

Mr. **Chambers**. Yes. I think that they are genuine concerns, and I do think S. 1124 may allow an administrative process that excessively entangles the Executive Branch in religious determinations, which bureaucracies ought not to be making.

I guess my instinct—I don't know; the other panelists may well disagree with me on this—my instinct is that those kinds of questions can only be made, if at all, by a court. I'm thinking of the *Wahls* case, the tax exemption case where the question was whether religious organizations could properly be tax-exempt, and the court just basically said,

> Well, my goodness, to have them not be tax-exempt and then to have the bureaucracy in there examining what's religious and what's not, and taxing some activities and not others would be much more intrusive of religion. If we're going to have tax exemptions, which we didn't have in Jefferson's day and Madison's day, we're going to have to exempt these in a blanket way.

I think if there are going to be enquiries into the indispensability of the practice or the traditionalness of the religion or something like that, I think those can only be made, if at all, by a court and not by some bureaucracy like the BIA, the IRS, the Park Service, anybody like that, despite whatever good intentions they have.

Mr. **Eberhard**. Thank you.

Ms. **Zell**. At this point in the record the testimony of the Confederated Tribes, the Salish and Kootenai, of the Flathead Reservation will be included.

[Materials referred to appears in appendix.]

Ms. **Zell**. The record will remain open until October 12.

On behalf of Chairman Inouye and Vice Chairman McCain, I would like to thank all of the witnesses who appeared here today for their testimony, for their hours of preparation and travel. Your testimony will be reviewed by the members of the committee, and I can assure you that your input will be important to the deliberations of the committee.

[Additional materials submitted for the record appears in appendix.]

Ms. **Zell**. With that, the committee stands in recess.

[Whereupon, at 4:43 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

STATEMENT OF JERRY ROGERS, ASSOCIATE DIRECTOR, CULTURAL RESOURCES, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE SELECT COMMITTEE ON INDIAN AFFAIRS, CONCERNING S.1124, THE PROPOSED AMERICAN INDIAN RELIGIOUS FREEDOM ACT AMENDMENTS OF 1989.

September 28, 1989

Mr. Chairman, I appreciate the opportunity to provide your Subcommittee with the views of the Department of the Interior on S. 1124, the "American Indian Religious Freedom Act Amendments of 1989", and to describe the policy of the National Park Service regarding Native Americans who have traditional religious associations with resources under Service management.

Mr. Chairman, we recommend against enactment of S. 1124. S.1124 would prohibit Federal lands considered sacred and indispensable by a Native American religion and that are necessary to the conduct of a Native American religious practice, from being managed to pose a substantial and realistic threat of undermining and frustrating such religion or practice. The bill would exclude management decisions necessary to carry out legal responsibilities of the Federal Government, protect a compelling governmental interest, or protect a vested property right.

The bill would also give the United States District Courts jurisdiction over civil actions to enforce the prohibitions, and it allocates burdens of proof in such actions.

We respect Native American rights to exercise their religions and support the concept of managing Federal lands in a manner that poses no substantial threats to religions of Native Americans who are traditionally associated with those lands. Consultations with Native Americans are required to determine whether threats exist and, if so, how mutually agreeable mitigation measures can be negotiated.

The Department of the Interior has instituted measures to meet the intent of the American Indian Religious Freedom Act. While some measures are still not as mutually satisfying as we would wish, the Department has consciously worked to respect the spiritual ties that bind certain Native American communities to sacred cultural and natural resources.

Indeed, these concerns led the National Park Service to make it a matter of policy that resources traditionally associated with Native Americans would be managed without impeding customary religious practices. These policies make S.1124 unnecessary for the Park Service.

Quite aside from the compliance requirements of preservation and environmental law, the Park Service's Management Policies commit the Service to protecting "...sacred resources to the extent practicable and in a manner consistent with the goals of the traditionally associated Native American tribe or group." Park Service policy further directs our land managers to be "...as unrestrictive as possible in permitting Native American access to and use of traditional sacred resources for customary ceremonials." Responsiveness to Native Americans concern for the continued integrity of their religious systems is as important, we believe, as protection for the integrity of the cultural and natural resource base.

Our policies also call for the Service to collaborate with Native Americans to develop a confidential database that can alert park managers to the presence of traditional resources with religious significance to the contemporary group. We call these enthnographic resources. We believe a database of enthnographic resources is an essential first step towards the formulation of non-intrusive Federal actions because it:

- will alert Federal managers to the presence of sacred resources and signal the need to consult Native Americans before any actions are undertaken, and

- facilitates the listing of sacred resources on the National registries maintained by the Park Service, specifically the National Register of Historic Places, and National Historic or Natural

Register of Historic Places, and National Historic or Natural Landmarks. These designations afford additional protection against potentially adverse actions.

To implement this policy goal, funds will be programmed to develop such a database as budgetary priorities permit. We believe this emphasis on culturally informed action, and consultation and negotiation in good faith, is crucial to meeting our policy objectives and the intent of S.1124.

Other Federal agencies also make concerted efforts to accommodate American Indian religious rights. For example, Bureau of Land Management (BLM) regulations require coordination with, and meaningful involvement of, Indian tribes in the development of resource management plans. Indian tribes are given opportunities to review plans, are notified of intentions to amend plans, and are asked to suggest topics and issues. The BLM also engages in many other activities to respect the intent of the American Indian Religious Freedom Act. For these reasons, enactment of S. 1124 is unnecessary.

This concludes my prepared remarks, Mr. Chairman. I would be pleased to respond to your questions.

STATEMENT OF
ALLAN J. WEST, DEPUTY CHIEF
FOREST SERVICE
UNITED STATES DEPARTMENT OF AGRICULTURE

Before the
Select Committee on Indian Affairs
United States Senate

Concerning S. 1124
"American Indian Religious Freedom Act Amendments of 1989"

September 28, 1989

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to offer the Department of Agriculture's views on S. 1124, the "American Indian Religious Freedom Act Amendments of 1989." With me today is Bob Tippeconnic, Tribal Government Program Manager for the Forest Service.

We wish to assure the Committee that the Department of Agriculture and the Forest Service support and appreciate the rights of Native Americans to exercise their religious beliefs and practices. Under current law, we identify, protect, and manage all significant cultural resources on National Forest System lands, including Native American cultural resources. We are attempting to work with Native Americans to ensure that their concerns are addressed. However, because of various concerns we have with S. 1124, we cannot support enactment.

Since the passage of the National Forest Management Act of 1976 (NFMA), which provides for public participation in the development, review, and revision of National Forest Land and Resource Management Plans, we place substantially more emphasis on coordination with Native Americans in order to understand their needs, concerns, and values.

We coordinate regional and forest planning with Native Americans and notify those whose lands or treaty rights are expected to be affected by agency activities. We also consider the objectives that Native Americans express in their plans and policies, and, where conflicts are identified, consider alternatives to resolve the conflicts. In short, our land management planning process provides special consideration for Native Americans. Also, our process specifically provides that Native American religious practices must be respected. To assure protection, it is important that Native Americans and the Forest Service consult during the planning process. Once a Native American interest receives protection in a land and resource management plan, all of our subsequent actions must be consistent with such protection.

Beyond these NFMA planning requirements, other laws also ensure that Native Americans' concerns are considered in our decisions. The National Environmental Policy Act of 1969 (NEPA) requires that we determine the scope of issues to be addressed in environmental impact statements. Regulations specifically require that affected Indian tribes be consulted during NEPA analyses. The National Historic Preservation Act requires protection of historic and cultural sites on Federal lands. The process of determining the effects of management on these sites involves consultation with interested parties, including Native Americans.

Native Americans also receive special consideration under the Archaeological Resources Protection Act of 1979. This act prohibits the disturbance or destruction of archaeological resources, including Native American religious and cultural sites located on public lands, except under a permit issued by the appropriate Federal land manager. We notify and consult with concerned Native Americans before issuing permits that may affect religious artifacts. As part of this program, we attempt to identify Native Americans having aboriginal or historic ties to National Forest System lands. We also attempt to locate and determine the significance of areas or specific sites of religious or cultural importance for future planning.

We are continuing to strengthen our methods of considering Native American issues in management of the National Forests. In 1988, we established the Tribal Government Program Manager position here in our national office to address Native American issues and to work with individuals and groups within the tribal community. We are trying to increase employee sensitivity to and awareness of Native American issues. We are also trying to establish more mutual and beneficial partnerships with tribal governments. Our policy has four major objectives:

(1) Maintain a governmental relationship with Federally-recognized tribal governments;

(2) Implement our programs and activities honoring Indian treaty rights and fulfill legally-mandated trust responsibilities to the extent they are applicable to National Forest System lands;

(3) Administer programs and activities to address and be sensitive to traditional Native American religious beliefs and practices; and

(4) Provide research, transfer of technology, and technical assistance to tribal governments.

As part of consultation, we conduct on-the-ground reviews, or "walking the land", with Native Americans. Our goal is to gain a better understanding and appreciation of cultural and religious beliefs and practices so that related issues are identified and properly acknowledged in Forest service programs and activities.

As an example, the Forest Supervisor of the Bighorn National Forest in Wyoming is working with the local tribes and others regarding the "Medicine Wheel," a National Historic Landmark. The Supervisor is attempting to determine the appropriate level of preservation, protection, and public access, and still maintain the opportunity for Indian tribes to exercise their religious beliefs and practices. In another example, we recently consulted with the Zuni tribe in New Mexico regarding their historic relationship to prehistoric sites on Mt. Graham.

Perhaps the most important recent event regarding the relationship between the Forest Service and Native Americans was a meeting just last week between the Chief of the Forest Service and representatives of two national Native American organizations to discuss sacred sites. At that meeting, we mutually agreed to have additional discussions related to Native American religious beliefs and practices.

In summary, we believe we have much "common ground" with Native Americans in the management of the National Forest System. As we implement our policy, we are meeting more with tribal groups and others to seek creative solutions to specific concerns and to find common ground. We are encouraged to see tribal governments eager to work with us. Together, we can take actions necessary to protect the religious beliefs and practices of Native Americans.

While we support the basic philosophy underlying S. 1124, we have concerns. Terms such as "substantial and realistic threat of undermining and frustrating" and "compelling governmental interest" need further definition. In addition, agreement on which Federal lands have "historically been considered sacred and indispensable" or "are necessary to the conduct of a Native American religious practice" may, in certain cases, be impossible. Also, we are concerned that section 3(c) of S. 1124 could be interpreted to allow a case to be taken directly to the United States district courts, thus effectively circumventing the existing administrative appeal processes. Because of these concerns, we cannot support enactment of S. 1124.

This concludes my testimony. Bob Tippeconnic and I will be pleased to answer your questions or provide additional information for the record.

USDA Forest Service

Response to Questions from the Senate Select Committee on Indian Affairs
S. 1124, "American Indian Religious Freedom Act Amendments of 1989"

1. To your knowledge has your agency participated in the development of an ethnographic database similar to the one being developed by the National Park Service? If so, when do you expect to complete your ethnographic database identifying Native American religious sites?

> The Forest Service has not developed a Service-wide ethnographic database. This information is being compiled by some National Forests as part of their Forest Land and Resource Management Planning (Forest Planning) process.

2. How is the U.S. Forest Service attempting to collect this information? How does the U.S. Forest Service collect information on Native American religious sites?

> The Forest Service is attempting to gather information on Native American religious sites in several different ways. Cultural resource overviews are being completed Service-wide. These documents include information on cultural properties and Native American religious and traditional activities and sites. Our Regional and Forest Planning process benefits from the coordination with Native Americans. Native Americans are consulted regarding religious and traditional sites and uses. As specific projects or activities are proposed, Native Americans are again consulted to determine what effects the proposed projects or activities may have upon important traditional or religious sites and areas. The protection of historic and cultural sites, as part of our cultural resource clearance process, requires further consultation with Native Americans.

3. What type of response have you received from American Indian Tribes in collecting information on Native American religious sites?

> The response varies. Some tribes or Native Americans share such information with us while others do not wish to have sacred sites located, mapped or documented in our records. Some Native Americans do not want the Forest Service or the general public to know the location of religious sites.

4. Apart from your administrative consultative process, what avenues, in your experience, are available for Native American Religious leaders seeking to protect their rights to access to religious sites, given the Lyng decision?

If a management decision will likely result in an action that conflicts with tribal access or use of religious sites, the tribe or Native American religious leader can appeal the decision. If the administrative appeal process does not resolve the issue to the satisfaction of the tribe, they can carry the matter to Federal Court.

Since the Lyng decision, the Forest Service has given additional attention to religious sites by the adoption of new manual policy and the addition of a Tribal Government Program Manager at the Washington office level.

5. Does the U.S. Forest Service maintain records documenting each consultation with an Indian Tribe regarding impacts to their religious sites or practices?

There is documentation for most consultations. Contacts that are general in nature or are introductions of the Forest Service to Indian tribes or Native Americans may not be documented. All consultations as a part of a subsequent plan, decision, or gathering of information should be documented.

6. Could you please describe the notification process the Forest Service currently utilizes to inform Indian Tribes of proposed development on Federal lands which may impact on their religious practices?

Normally, written notification is sent to the Indian tribe when preliminary information is being gathered and before alternatives are developed to address a management issue or problem (proposed development). Tribes are asked to provide information on the identified issues and concerns relative to their interests. In some instances, the Forest Service has created advisory groups that include Native Americans to provide input into management decisionmaking.

Additional verbal contacts may also be made, especially where working relationships have been established with tribes.

The Forest Service will likely visit with the tribe if an overview, literature search, or some prior information has determined the tribe would be affected by an action relative to the issue. The tribe, upon formal notification, may advise they are concerned. Their response may request involvement or generate a contact by the Forest Service.

7. Do you feel there is enough similarity between Federal agencies, such as BLM, the Forest Service and the Park Service to warrant the development of uniform regulations and administrative process to ensure the protection of Native American Religions and religious practices?

> **The missions of the Bureau of Land Management and Forest Service are very similar. The mission of the Park Service is different. It would seem desirable to have uniform regulations, or at least regulations that were closely coordinated. However, without further review and evaluation, we are not able at this time to give a direct answer to this question.**

8. Is your policy on Native American Religious Freedom reflected in Departmental regulation? If so, could you provide us with the cites?

> **No, our policy and procedures related to Native American Religious Freedom are within the Forest Service manual, other directives, and memoranda.**

9. What issues were discussed in the recent meeting between the Chief of the Forest Service and Native American leaders?

> **Three issues were discussed: (1) the use of and access to religious sites, (2) awareness training for Forest Service employees in Native American culture, and (3) repatriation of important religious artifacts and objects. The Forest Service will work with tribal leaders on all these matters.**

10. How would the development of a standard of "least intrusive means" change existing departmental policy in the Forest Service regarding the protection of Native American religious sites?

> **The interpretation of "least intrusive means" would have to be determined by consultation on a case-by-case basis. In some circumstances, agreement on interpretation may be reached and in others it may not. Our current procedures for the assessment, analysis, and consultation with Indian tribes and others should be sufficient to allow this determination to be made.**

11. What standard is currently used in evaluating the agency's decisions regarding Federal land management impacting Native Religious sites?

> **We utilize three standards: (1) our policy to "administer programs and authorities to address and be sensitive to traditional Native American religious beliefs, and practices," (2) the National Historic Preservation Act, requiring protection of historic and cultural sites on Federal lands, and (3) the Archaeological Resources Protection Act of 1979, which prohibits the disturbance or destruction of archaeological resources, including Native American religious and cultural sites.**
>
> **The standard also includes provisions for participation by tribes in our Forest Planning and NEPA analysis. Thus the tribes have an opportunity to let us know what they want protected or maintained.**

DANIEL K. INOUYE, HAWAII, CHAIRMAN
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United States Senate
SELECT COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, DC 20510-6450

October 2, 1989

Mr. Allan J. West
U.S. Forest Service
Department of Agriculture
12th St. and Independence Ave. SW
Washington, D.C. 20250

Dear Mr. West:

Thank you for your testimony before the Select Committee on Indian Affairs. It is our hope that through our continued efforts we can address the problem of protecting the religious freedom and religious practices of Indian tribes in this country. At the September 28th hearing of the Select Committee on Indian Affairs, there were several questions submitted for the record for your response. We would like to request that your written response to the following additional questions be forwarded to the Select Committee on Indian Affairs no later than October 12, 1989. All responses will be made a part of the formal hearing record.

1) To your knowledge has your agency participated in the development of an ethnographic database similar to the one being developed by the National Park Service? If so, when do you expect to complete your ethnographic database identifying Native American religious sites?

2) How is the U.S. Forest Service attempting to collect this information? How does the U.S. Forest Service collect information on Native American religious sites?

3) What type of response have you received from American Indian Tribes in collecting information on Native American religious sites?

4) Apart from your administrative consultative process, what avenues, in your experience, are available for Native American Religious leaders seeking to protect their rights to access to religious sites, given the Lyng decision?

5) Does the U.S. Forest Service maintain records documenting each consultation with an Indian Tribe regarding impacts to their religious sites or practices?

6) Could you please describe the notification process the Forest Service currently utilizes to inform Indian Tribes of proposed development on Federal lands which may impact on their religious practices?

7) Do you feel there is enough similarity between Federal agencies, such as BLM, the Forest Service and the Park Service to warrant the development of uniform regulations and administrative process to ensure the protection of Native American Religions and religious practices?

8) Is your policy on Native American Religious Freedom reflected in departmental regulation? If so, could you provide us with the cites?

9) What issues were discussed in the recent meeting between the Chief of the Forest Service and Native American leaders?

10) How would the development of a standard of "least intrusive means" change existing departmental policy in the Forest Service regarding the protection of Native American religious sites?

11) What standard is currently used in evaluating the agency's decisions regarding Federal land management impacting Native Religious sites?

Again, I would like to thank you for your testimony on this most important issue. Your testimony will be of great assistance to our Committee in our deliberations on this bill. Should you have any questions regarding the Committee's hearing, please contact the Committee's Minority Staff Director, Eric Eberhard or the Deputy Minority Counsel, Steven J. W. Heeley at (202) 224-2251.

Sincerely,

John McCain

John McCain
United States Senator

THE NAVAJO NATION

LEONARD HASKIE
INTERIM CHAIRMAN
THE NAVAJO TRIBAL COUNCIL

IRVING BILLY
INTERIM VICE CHAIRMAN
THE NAVAJO TRIBAL COUNCIL

TESTIMONY OF
LEONARD HASKIE
INTERIM CHAIRMAN OF THE NAVAJO NATION
BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
ON
S.1124 AMENDING THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT OF 1978

Mr. Chairman and members of the Committee, I am honored to have been invited to testify before you on S. 1124, a bill to amend the American Indian Religious Freedom Act of 1978. On behalf of the Navajo Nation, I would like to express my personal gratitude to Senator McCain for introducing this measure.

The Religious Freedom Act was expressly designed to protect and preserve for American Indians the freedom to believe, express, and exercise their Native Religions. The Act states that this includes the protection and preservation of access to sites and the use and possession of sacred objects. Mr. Chairman and members of the Committee, this is a good and important policy.

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This vital Act must be designed and implemented with the utmost concern and sensitivity to the diversity and uniqueness of the religious practices of American Indians, Native Alaskans, and Native Hawaiians. The American Indian Religious Freedom Act embodies an objective which must be used to guide decision-making to preserve and protect religious freedom.

The proposed amendments will be essential to this effort. Since the Act's creation, American Indians, who have earnestly sought protection of their right to exercise their religions, have suffered tremendous disillusionment as courts have repeatedly interpreted the Act as an empty congressional acknowledgment of Native American culture.

Court decisions which appear to offer protection to Native people to practice their religions have ultimately resulted in hollow victories. For example, in 1989, the Navajo Nation,[1] sought protection under the Religious Freedom Act to allow our people and religious leaders living in Southern Utah, to continue to exercise their religion at the sacred site known as Rainbow Bridge. Denying our claim, the Appellate Court held that the drowning of our gods, denial of access to our prayers sites, and the desecration of our sacred site was not an infringement upon the free exercise right of our Navajo people and religious leaders. Our people sought only an accommodation of their religious interests, not a complete bar to the use of

Rainbow Bridge by all others. Instead, our Tribe has been forced to tolerate the unmitigated desecration of this religious site.[2]

In 1983, the Navajo Nation, in a joint effort with the Hopi Tribe fought another legal battle for religious freedom. In this instance, we sought protection under both the Religious Freedom Act and the First Amendment to stop the desecration of an area, sacred to both our people, commonly known as the San Francisco Peaks. Again the Act was interpreted by the court as a policy statement that only required "agencies to learn about, and to avoid unnecessary interference" with Indian religious practices. Because the Act contained no explicit directives requiring agencies to do more, the sacredness of our honored mountains, and the home of the Hopi Kachinas, suffered in the hearts of our people and religious leaders as the way was cleared for the Snow Bowl Ski Resort expansion. In the court's opinion, our religious practices did not fall within First Amendment protection because Navajo and Hopi people were not denied access or coerced into practices against their religion.

At the end of a long legal battle, in 1988, the U.S. Supreme Court delivered a further blow to the religious freedom of Native people in a decision which stated[3] that the free exercise clause of the First Amendment did not forbid the Government from constructing a timber road through a sacred site. Through this decision the Supreme Court undermined the foundation of religious freedom by denying American Indians the protections afforded to other Americans.

This record of disappointment evidences the need for Congress to reconfirm the goals and strengthen the enforcement of the Act. The protection and respect accorded to the religions of Native people must be equal to those accorded other religions. It is because of these concerns that the Navajo Nation supports S. 1124 as an effort to strengthen the policy behind the Religious Freedom Act.

S. 1124 is correct in its finding that the traditional practices of Native American religions are inseparably bound to land and natural formations. Land and other natural resources are as sacred to us as churches, synagogues and cathedrals are to other religious people around the world. Equally important is the declaration that: "Lack of sensitivity or understanding of traditional Native American religions on the part of federal agencies vested with the management of federal lands has resulted in the lack of a coherent policy for the management of sacred sites found on federal lands." The lack of coherent management and basic respect for sacred sites has resulted in the sad history of infringement of religious freedom suffered by Native Americans.

The strength of the proposed amendments is contained in Section 3(a). The Navajo Nation supports the proposition that federal lands, which contain sacred sites whose use is necessary to the practice of Native religions, shall not be managed in a manner which will pose a substantial and realistic threat of undermining and frustrating such religion or religious practice. It is the position of the Navajo Nation that the original intent of the Act can be carried out only with a clear mandate as stated in Section 3(a).

However, the strength of Section 3(a) is diluted by the express exception found in Section 3(b)(1)(A) which affords agencies broad and dangerous discretion. The Navajo Nation strongly urges that the language of Section 3(b)(1)(A) be altered so that the stated intent of the Act is not consumed by the exception.

The Navajo Nation realizes that accommodating the divergent interests between Native people, who seek protection of their right to exercise their religious practices, and federal agencies, who are responsible for the management of federal lands, is not an easy task.

In the effort to reach mutual accomodation, we recommend that the amendments to the Act direct agencies, which manage federal lands, to keep complete records of agency consultations and decisions which concern and impact Native religious practices. Complete record keeping will assist agencies in becoming aware of the legitimate concerns of Native people with whom the agencies have consulted. Complete documentation will then be available as a full record of the agency policy that took place in reaching a final decision. Such a procedure will add substance to the decisionmaking and credibility to the review process.

In closing, I would like to express my thanks to each of you for your efforts to protect the heritage of my people. In addition, I would like to remind you that by protecting our religious heritage, you protect and defend your own heritage of religious freedom for all Americans.

Thank you for this opportunity to communicate to you the position of Navajo Nation on Senate Bill 1124.

[1] Bedoni v. Higgins, 638 F.2d 172 (1980)

[2] Wilson v. Block 708 F.2d 735 (1983).

[3] Lyng v. Northwest Indian Cemetery Protection Association, 485 U.S. 439, 99 LEd. 2d 534 (1988).

THE NAVAJO NATION

LEONARD HASKIE
INTERIM CHAIRMAN
THE NAVAJO TRIBAL COUNCIL

IRVING BILLY
INTERIM VICE CHAIRMAN
THE NAVAJO TRIBAL COUNCIL

October 18, 1989

The Honorable John McCain
Vice Chairman
Senate Select Committee on Indian Affairs
Hart Office Building
Washington, D.C. 20510

The Honorable John McCain:

At the request of Interim Chairman Leonard Haskie, I am providing the following information in response to the specific questions stated in a September 29, 1989 letter from you to Interim Chairman Leonard Haskie regarding the American Indian Religious Freedom Act Amendments of 1989.

1. Has the Navajo Nation been contacted by the National Park Service for information for the development of their ethnographic database?

The Navajo Nation has not been contacted by the National Park Service with respect to any effort to develop an ethnographic database. There have been efforts by the Bureau of Land Management (BLM) regarding off-reservation land adjacent to the southeastern border of the Navajo Nation (the "Checkerboard Area"). These efforts, which took place 7 or 8 years ago, were primarily related to the Competitive Coal Leasing initiative implemented by former Secretary James Watt. Therefore, the areas under assessment were determined by the location of the coal leasing formations.

The establishment of an ethnographic database which would list, locate, and describe native religious sites is vital to the efforts by federal agencies to plan the management and development of federal lands. These federal plans must be designed with great caution and sensitivity to the nature of native religious practices. It is imperative that federal agencies appreciate that often

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locating and describing a site through the technical means required for development of the database is a desecrating act as it diminishes the religious value and sacredness of the site and the religious practice. This does not mean that the Navajo Nation would not assist in the development of such a database, however, some compromise and sensitivity may be required in the process of compiling the data.

The efforts by the BLM in the Checkerboard Area was based on information obtained from two basic sources. Information was obtained from literature written about Navajo culture, archeological studies, and ethnological accounts. Information was also compiled based upon archeological fieldwork.

Admittedly, these are valuable sources of ethnographic data. However, when dealing with sites that are necessary to native religion practices, federal agencies must also solicit input from contemporary native groups and native religious practitioners. Although actions may be contrary to federal agency plans or decisions, if amendments to AIRFA are to be meaningful, agencies must be mandated to take specific action if the input by native groups warrants such action.

Input by native people is critical to creating an ethnographic database. Equally important are assurances by federal agencies that our views and concerns will be included in the process. It is inherent in the spirit of the American Indian Religions Freedom Act that the comprehensive identification of sites be developed without compromising the reverence of such sites through the identification process.

Be assured that the Navajo Nation would be open to developing a means by which identification, sufficient for federal land management purposes, could result without the desecration and abridgement our religious sites and beliefs. It is neither promotion nor establishment of religion by federal agencies to allow affected native groups to participate in the creation of methods through which we can work together with agencies to aid the survival of the religious plurality and diversity that this country was founded upon.

2. How could the collection of this information be best achieved by the National Park Service? Who should be contacted to provide information on the Navajo Nation's religious sites and practices?

The collection of ethnographic information by the Forest Service could be achieved by requiring that the agency work with affected native groups to compile an ethnographic data base. As previously mentioned, any project to establish an ethnographic data base should seek to maximize the information sources beginning with literature, ethnographic accounts, archeological reports, and oral and written input from contemporary American Indian groups.

The Navajo Nation has available to such efforts the Navajo Nation Office of Historical Preservation; Division of Resources, Archeology Department; extensive anthropological, archeological, and ethnographic reports which have been published on Navajo history and culture. Information might be offered by the Navajo Medicinemens' Association, and Navajo religious practitioners. In addition, we have our own history commonly referred to as the "Navajo Creation Story" and Navajo Community College instructors who teach Navajo culture as part of the curriculum of the College would also be valuable assets. These sources of information are all available to develop a comprehensive ethnographic database.

3. Your testimony suggests problems in the Federal agency methods of record keeping and documentation of the consultative process with Indian Tribes. What specific record keeping or documentation problems has the Navajo Nation experienced in the administration process?

The comment regarding record-keeping methods and documentation in the testimony by the Navajo Nation was offered to suggest a method which could assure native groups of the availability of a factual record should they initiate an administrative appeal of a decision by a federal agency. It is anticipated that there will be cases in which a federal agency reaches a final decision wherein an agency action is deemed not to "pose a substantial and realistic threat of undermining and frustrating" a native religion or religious practice. It is realistic to expect that agencies responsible for management of federal land will be more likely to utilize the exemptions in 3(b)(1).

The assurance of a record will assist native groups who decide it is in their best interest to take issue with federal agency decisions based on Section 3(a) or 3(b)(1) to request a reevaluation of the agency decision.

4. Do you feel there is enough similarity between Federal agencies, such as BLM, the Forest Service and the Park Service to warrant the development of uniform regulations and administrative process to ensure the protection of Native American Religions and religious practices?

The Navajo Nation recognizes that the structure of the Federal system, the Bureau of Land Management, Park Service, and the Forest Service are sufficiently diverse as to complicate attempts to develop uniform regulations and administrative processes. Nonetheless, there is potential for developing effective regulations and an administrative processes to ensure protection under AIRFA if these agencies and their departments have clear legislative mandates as to the specific means through which agencies are to comply under AIRFA.

According to the testimony submitted by the BLM and the Forest Service regarding S. 1124, they purport to actively solicit input from native groups. These efforts are appreciated by Indian tribes and such efforts should continue. However, the staunch resistance to S. 1124 on the part of both these agencies, on the basis that they currently exercise compliance with AIRFA policy, is misleading. The key issue is whether federal agencies are required to take specific direction based on the nature of that input. Putting teeth into AIRFA means directing federal agencies not only to solicit input, but more importantly, to take action based on meaningful understanding of that input.

The Navajo Nation has experienced some willingness to consider potential impacts to native religions resolution from decisions regarding federal land management by the BLM and the Park Service. The Navajo Nation stands ready to work with these and other federal agencies to develop uniform procedures that will effectively implement the congressional intent behind S. 1124.

5. Would your concerns regarding section 3(b)(1) which exempts decisions which are necessary "to carry out the legal responsibilities of the Federal government" be alleviated

if the language was amended to read "to perform an act required by an Act of Congress"?

Certainly amending Section 3(b)(1) of S.1124 to read "to perform an act required by an Act of Congress" clarifies the vagueness of: "to carry out legal responsibilities of the Federal Government." Substantively, however, this amendment to S.1124 does little to alleviate the Navajo Nation concerns that the exemption in Section 3(b)(1) dilutes the policy behind AIRFA, and effectively dismantles the effort set forth in Section 3(a). Refinement of Section 3(b)(1) must be crafted to permit the passage of only those agency decisions which are truly legitimate and result in minimal intrusive impact.

On behalf of the Navajo Nation and Interim Chairman Haskie, I appreciate the opportunity to provide further information regarding this vital topic. If any additional questions arise, please contact me or the Navajo Nation Washington Office.

Sincerely,

Irving Billy
Interim Vice Chairman
Navajo Nation

CHAIRMAN IVAN SIDNEY
9/28/89
S. 1124, THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT AMENDMENTS OF 1989

Thank you Chairman Inouye and Senator McCain for allowing me to present testimony on S. 1124, the American Indian Religious Freedom Act Amendments of 1989.

The Hopi Tribe of Arizona is proudly one of the longest surviving inhabitants of the North American continent. Our village of Oraibi is indisputably the oldest continuously occupied settlement in the continental United States. We reside and have worshiped freely in northeastern Arizona lands, centuries before Columbus discovered America. At the heart of our longevity, is our religion -- an infinite source of strength from generation to generation.

Our religion embodies a world-view of life, which is deeply intertwined with and represented by the natural land structures of our region. Hopi existence relies upon the unbroken observance of natural laws. Our religious ceremonies are adherent in maintaining the harmony of the universe. The Hopi people continuously attempt to preserve, to the greatest extent possible, observance of their ceremonial customs. This of course means preservation of the natural land sites and natural resource materials used as part of our ceremonies -- and requires unencumbered access to those sites.

I believe that all Native American peoples have an inherent right to the free exercise of their religion. That right is reaffirmed by the U.S. Constitution in the Bill of Rights, as well as in our tribal constitution. In 1978, the United States Congress took an important step toward protecting and preserving Native Americans rights to the free exercise of their religion with the enactment of the American Indian Religious Freedom Act. This Act set in place a national policy of protecting and preserving for Native Americans the freedom to believe, express and exercise their traditional religious prerogative. The Act directed various federal executive agencies responsible for administering relevant laws to evaluate their policies and procedures to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices.

The legislation we have before us today, S. 1124, is legislation which amends the American Indian Religious Freedom Act by establishing an enforcement mechanism to ensure that the management of federal lands does not undermine and frustrate traditional Native American religious practices. The legislation would create a new statutory cause of action on behalf of any party aggrieved by federal government activities that occur on federal lands used by traditional Native Americans in religious observance. The challenger and challenged would have established burdens of proof under the legislation. For example, the challenger must prove that the decision of the federal agency will pose a substantial and realistic threat of undermining and frustrating a traditional Native American religion or religious practice.

As a refinement and enhancement of historic legislation designed to ensure and protect Native American religious practices, this legislation is to be applauded and supported. Nonetheless, there are certain perils that the Committee needs to take into consideration.

Because the religious freedom issue is an emotional and moral issue, deciding where one's rights begin and another's ends is difficult at best. Accordingly, it is imperative that this admirable legislative effort not become a vehicle for mischief. Therefore, while supporting the concept of this legislation -- that of putting an enforcement mechanism is place --, I would respectively urge the Committee to carefully consider certain potential and troubling ramifications of this bill as drafted. Specifically, I am concerned that the pending legislation might further complicate an already complicated state of affairs in Northern Arizona relating to the historic Navajo-Hopi land dispute, with which I know this Committee and the Congress are all far too familiar.

As you know, Hopi ceremonial and religious shrines are significantly dispersed through the four corner region which includes the Hopi and Navajo reservations. Certain of these sites are already the subject matter of important litigation pending in Arizona and having a direct impact on the relocation process. Such litigation is presently being considered by the federal district court in Phoenix, appropriately within the larger context of the partition and relocation processes mandated by Congress in the 1974 Settlement Act, as amended. It strikes me, with all respect, that it would be inappropriate for the Congress to inadvertently affect the disposition of such cases, already proceeding pursuant to a comprehensive statutory scheme under the administration of the federal court in Phoenix.

Therefore, I urge and caution the Committee to take appropriate action to fine tune this meritorious legislative work product so as to avoid this concern. How might this be done? There are several possibilities that come to mind, such as removing from the scope of the bill the following:

a. Former JUA land altogether; or

b. Lands subject to judicial decrees of partition; or

c. Government agency action already the subject of existing court orders or decrees; or

d. Government agency action in support of land management or range conservation practices undertaken at the request of and with the concurrence of an Indian Tribe on land belonging to that Tribe.

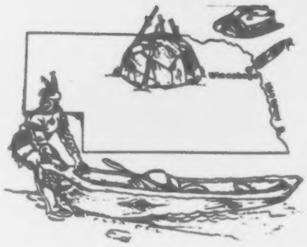
Mr. Chairman, Senator McCain, distinguished Members of the Committee, I respectfully urge the consideration of these suggestions, along with other options that might be responsive to my concerns.

Let me be clear that the Hopi Tribe fully embraces the intent of this legislation. It promises a necessary and worthwhile improvement in current law. Nonetheless, the Hopi people have spent far too much time in Court protecting our rights as determined by the Congress. Too often, we have seen new legislation seized upon as new basis for litigation designed to frustrate and delay the orderly implementation of the relocation process. I respectfully implore the Committee to take necessary steps to ensure that this worthwhile legislation cannot be utilized by outside agitators or others for such a purpose.

Finally, allow me to once again commend Senator McCain and his staff for this legislative initiative to improve and protect the rights of Native Americans. As Chairman of a Tribe whose people believe protection of our religious customs lies at the core of our existence, I applaud this undertaking. I also sincerely thank the Committee for providing me the opportunity to testify today.

WINNEBAGO TRIBE of NEBRASKA

WINNEBAGO TRIBAL COUNCIL P.O. BOX 687 WINNEBAGO, NEBRASKA 68071



September 26, 1989

John McCain
Select Committee on Indian Affairs
U.S. Senate
Washington, D.C. 20510-6450

Dear Mr. McCain:

Mr. Chairman and members of the Interior and Insular Affairs Committee, as a member of the NCAI Cultural Concerns Committee and the designated representative of the Winnebago Tribe of Nebraska on cultural and religious concerns, I am honored to submit testimony on S. 1124 the American Indian Religious Freedom Act.

I have successfully advocated on behalf of the Winnebago Tribe for the passage of the "Bones Bill" in the Nebraska Unicameral which provides for the repatriation of Native American remains and burial goods.

The Winnebago Tribe of Nebraska is committed to the preservation of our Native religious and culture which depend upon the preservation of sacred land areas, many of which are managed by federal agencies. Although the American Indian Religious Freedom Act was established as a national statement of policy concerning Native religious freedom, it has produced no significant changes in the preservation of sacred land areas under federal ownership.

While S. 1124 provides for a means for Native people to challenge the decisions and activities of agencies, I would like to make several recommendations.

1. Federal agencies should be mandated to make consultation by written agreement with affected tribes and groups in order to determine whether federal land management poses a substantial and realistic threat of undermining and frustrating a religion or religious practice.

2. Federal agencies should be required to maintain a full and complete record of the consultation process, including a thorough discussion of all reasonable alternative courses of action (including "no action"), and the basis for the selection of the final course of action.

3. The criteria listed under Sec. 3(b)(1)(A) "carry out the legal responsibilities of the Federal Government" is a loophole which will allow federal agencies to subvert the intent and purpose of the American Indian Religious Freedome Act and should be stricken.

4. Federal agencies should be mandated to promulgate regulations to implement the American Indian Religious Freedom Act.

5. Federal agencies should be required to maintain complete records of all land management decisions and other actions which will possibly impact Native religious and agency decisions should be subject to de novo review by federal district courts.

6. The burden of proving the decision of the Federal agency will pose a substantial and realistic threat of undermining and frustrating Native American religion or religious practices, should fall on the Federal agency in addition to the burden of proving its decision was based on the criteria Sec. 3(b)(1) and that its course of action is the least intrusive on the Native American religion or religious practice.

7. Finally, S. 1124 should contain a provision awarding attorney's fees and costs to Native people who prevail in legal actions against federal agencies to enforce the provisions of the American Indian Religious Freedom Act, as amended.

S. 1124 with the above amendments would serve to preserve and protect the sacred land areas of our Native religious and cultures. Please seriously consider my recommendations on this bill.

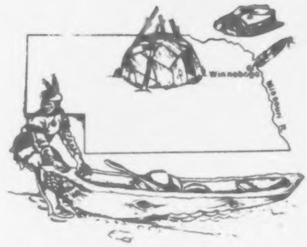
Sincerely,

Reuben A Snake Jr

Reuben A. Snake, Jr. mcs
Council Member

WINNEBAGO TRIBE of NEBRASKA

WINNEBAGO TRIBAL COUNCIL P.O. BOX 687 WINNEBAGO, NEBRASKA 68071



October 11, 1989

John McCain
Select Committe on Indian Affairs
U.S. Senate
Washington, D.C. 20510-6450

Dear Mr. McCain:

I am pleased to elaborate on my September 29 testimony on S.1124 the American Indian Religious Freedom Act (AIRFA) because I believe my recommendations upon implementation will serve to preserve and protect the sacred land areas of our Native religious and cultures. I will address your questions one by one.

1. The Winnebago Tribe of Nebraska has not been contacted by the National Park Service for development of their ethnographic data base.

2. The Winnebago Tribe's Land Management Coordinator, Del Free, is in the process of identifying all historic, cultural and place names on the Winnebago Indian Reservation for the Tribe's land use plan. He is the point of contact for the National Park Service.

3. Federal agencies have not implemented the American Indian Religious Freedom Act and have ignored its provisions. A case in point, in Lyng v. Northwest Indian Cemetary Project, 99 L.Ed.2nd 534 (1988) the Forest service even when made aware by their own expert witness of the detrimental impact of the Federal Agency action on a Native American religion, the agency chose to proceed with the project.

   Some Federal agencies may even discriminate against Native religions i.e.. In 1987 James Mathers, Forest Supervisor of the Black Hills National Forest, denied a special use permit to Sioux Indians from South Dakota to construct a spiritual encampment, despite the existence of several Christian church camps and the Rapid City Country Club in the same forest.

   Given the history of lack of implementation of AIRFA by federal agencies, Congress may assume the federal agencies lack the expertise to determine the requisite findings of fact and lack the impetus to educate themselves to do this and need a check on otherwise unconstitutional and discriminatory conduct by agency officials. De novo review would provide the necessary check and balance to assure implementation of AIRFA.

4. I will change my recommendation on burden of proof. An Indian Tribe need only allege that the federal agency action will pose a substantial and realistic threat of undermining and frustrating Native American religion or religous practices as a rebuttable presumption. The federal agency then has the burden of proof to disprove the presumption.

   Most tribes do not have the financial resources to bring forward its religious informants and expert witnesses otherwise. On the other hand, federal agencies have the resources to rebut such a presumption if necessary to carry forward a project.

5. While the Winnebago Tribe has not experienced specific record keeping or documentation problems, other tribes have in their dealings with federal agencies. Out of a survey done by Native American Rights Fund regarding the 1978 AIRFA, tribes based on their poor experiences with federal agencies recommended a mandatory consultation process with mandatory agency record keeping of the consultation process. This will allow agency officials to fully understand their legal responsibilities and give them the administrative and policy guidance to carry out these responsibilities. They will finally be cognizant of the specific concerns and needs of the affected Indian tribes. Record keeping will track the level of effort made by officials to fully understand the ramifications of their decisions.

6. I am not against development of uniform regulations and administrative process to implement AIRFA. Even where National Park Service published a Native American policy regarding AIRFA, it restricted Native uses to National Park Service rules and policies which in effect nullified the original intent and purpose of AIRFA 52 Fed. Reg. 25674, 35674-35675 (1978). Federal agencies need regulations to implement AIRFA. Without regulations, AIRFA will continue to be ignored by federal agencies.

7. Yes, "to perform an act required by Act of Congress" is narrower than the "legal responsibilities of the Federal Government". 1978 AIRFA had no effect on agencies interpretations of federal laws ie. the Wilderness Act, the National Forest Management Act, the Multiple Use and Sustained Yield Act, the Federal Land Management Policy Act, the Endangered Species Act. These laws were used to justify projects which violated the Constitutional rights of freedom of religion of Native Americans across the country even where some alternatives existed which would comply with AIRFA.

Again, I firmly believe my recommendations on S.1124 would serve to preserve and protect the sacred land areas of our Native religions and culture. Please seriously consider my recommendations on this bill.

Sincerely,

Reuben A Snake Jr
Reuben A. Snake, Jr.
MES

STATEMENT OF

WILL MAYO
SPECIAL ASSISTANT TO THE PRESIDENT
TANANA CHIEFS CONFERENCE, INC.
122 FIRST AVENUE
FAIRBANKS, ALASKA 99701
(907) 452-8251

BEFORE THE
SELECT COMMITTEE ON INDIAN AFFAIRS
U.S. SENATE

ON S. 1124

AMENDMENTS TO THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT

SEPTEMBER 28, 1989

WASHINGTON, D.C.

On behalf of Tanana Chiefs Conference, I wish to express our support for S. 1124 which would amend the American Indian Religious Freedom Act to clarify federal land management policies to more fully protect the religious freedom of traditional Native American religious practices. As you may know, Tanana Chiefs Conference is the regional Native non-profit corporation composed of 43 Alaskan Native tribes of Interior Alaska.

The majority of our tribes are Athabascan Indian villages, and in many of these villages, traditional Indian religious practices are practiced day-to-day and form the moral foundation of our people. A major part of the community life in our villages revolve around funeral and memorial potlatches. These potlatches are communal feasts with the spirits of our deceased relatives and friends. A funeral potlatch will occur at the time a person dies, and be followed by a memorial potlatch usually held about a year following the death, when the family releases the spirit of the deceased. A vital part of the potlatch is the use of fresh moose meat and other Native foods. The best Native foods should be used and often these foods must be obtained outside of established seasons and personal bag limits for these ceremonial uses.

Currently, under the Alaska National Interest Lands Conservation Act (ANILCA) the federal government permits the State of Alaska to manage fish and game upon federal lands. Historically, the State of Alaska has criminally prosecuted Athabascans who harvest moose outside of established seasons for funeral and memorial potlatches. In 1978, the State Supreme Court ruled in Frank v State, that such prosecutions of participants in a funeral potlatch violated the Free Exercise Clause of the U.S. Constitution, but did not rule about use of such game for memorial potlatches. For the last six years, TCC has been in Federal District Court over the memorial potlatch. TCC v Cowper, No. F83-034. (U.S. Dist. Ct. AK). Recently, the Court held that memorial potlatches were religious behavior and is now considering whether the State can restrict the harvest of potlatch moose to established seasons, which would not permit use of fresh moose in many potlatches. We believe that the potlatch is a vital part of the religious beliefs and practices of our people and does not threaten or endanger animal species, upon which Native people depend for their subsistence. The State should not be allowed to do what the Federal government cannot do, especially when it is operating under a delegation of authority from the federal government.

As currently written, S. 1124 does not specifically apply where federal land management is conducted by a state or local government agency. We would propose that the statute be amended to add the following language to page 2, line 20 following the word "lands":

"... and resources occurring upon such lands"

and add the following language to page 3, line 1, following the word "manage":

"... by a federal, state or local governmental agency"

This would clarify that all federal lands and these resources would be managed in accordance with the law regardless of whether the management has been delegated to a non-Federal agency.

We are also concerned that Sec. 3(a) of the amendment restricts the major protections available under either Sec. 3(b)(1) or (2), to sites which are "indispensable" to a Native religion. This is in addition to the burden requiring that the lands and resources be considered sacred and necessary to the conduct of Native American religious practice. In other words, the Acts protections only apply when the very existence of a Native religion is in question. All other practices would lack any protection including the obligation to accommodate the practice when possible contained in Sec. 3(b)(2). This would allow federal agencies to ignore considerations accommodating Indian religious practices except in the rare cases where the existence of the religion was in question. We would recommend deleting this requirement, which would be consistent with the House version of the Amendments (See H.R. 1546).

Sec. 3(b)(1) contains several exceptions not contained in the House version. H.R. 1546 would allow federal agencies to undermine or frustrate a Native American religion or religious practice only when the Federal government has a compelling interest to do so. We believe that religious freedom should only be limited in the face of a compelling interest. S. 1124 includes other exceptions which may or may not fall within this "compelling interest" test in any given case. For example, it may be a compelling government interest to carry out the legal responsibilities of the federal government, however, it is unclear whether "legal responsibilities" includes discretionary acts by a federal land manager who has a legal responsibility to exercise that discretion. Similarly, it is unclear whether the exception to "protect a vested property right" merely refers to third party interests (such as leasee's of federal land) or also includes the federal agencies property rights to exercise discretion in property management. We believe the language in the bill is too vague and subparagraphs

(A) and (1) should be deleted. In the alternative, the section could be clarified as follows to carry out the legitimate interests of the federal government:

> "(A) perform an act required by an Act of Congress . . . .
>
> (C) protect a prior existing property right vested in a party other than a government agency."

We believe that these changes will greatly enhance the legislation to carry out the intent of the American Indian Religious Freedom Act. The protection of Native American traditional religious practices is essential to the preservation of the religious beliefs of many of our people. Currently, the legal protections for these religious practices is virtually non-existent. We strongly urge you to approve this legislation in a manner which will truly protect the religious freedom of traditional Native American religious practitioners.

Thank you for your consideration.

PREPARED STATEMENT OF WALT LARA, SR.
ON S. 1124, AMERICAN INDIAN RELIGIOUS
FREEDOM ACT AMENDMENTS OF 1989

Washington, D.C., September 28, 1989

My name is Walt Lara, Sr. I am a Yurok Indian from the Yurok Indian Reservation, located along the Klamath River in northwestern California. I am Chairman of the Northwest Indian Cemetery Protective Association, which organization was a plaintiff in the Lyng case that went before the U.S. Supreme Court. As you may know, the Lyng case involves the traditional ceremonial practices of the Yurok Indians, and other northwestern California Indians, and the U.S. Forest Service's plans to build the G-O Road through the middle of our sacred area. I appreciate the opportunity to speak today in support of increasing the protection given traditional American Indian religious sites and practices because I personally know the threat our religion faces, and the importance of this issue to Indian people throughout California and nationwide.

I have been involved in Indian affairs in California for nearly 30 years. I have served two terms as Chairman of Inter-tribal Council of California, which was comprised of over 100 Indian tribes and organizations from California. I also have served as Chairman of the (Tri-County) Northern California Indian Development Council, an organization serving the tribes and Indian people in Northern California in the area of economic development. I was one of the founders of the Klamath River Wildlife Conservation Association, the first organization to do a fish enhancement project on the Klamath River in conjunction with the Bureau of Indian Affairs and the Indian Development Council.

I have served as a Commissioner under Governor Brown and Governor Deukmejian on the California Native American Heritage Commission, a commission created by California statute. In 1976 California created the Native American Heritage Commission pursuant to a law that provides protection to the free exercise of American Indian religion by assuring access to sacred sites and preventing destruction of such sites on state lands in California. The California law allows the court, upon making certain findings, to issue an injunction against the proposed action to prevent damage to the sacred site. This law has been in effect in California for over 10 years and has not raised the fears and problems raised by those who have testified against proposed amendments to the American Indian Religious Freedom Act.

All my life I have been involved with the ceremonial practices of the Yurok people. These beliefs and practices have been passed on to me by my family before me. I am now 54 and serve as one of the head people in seeing that the practices and ceremonies continue on as they have throughout time. These practices are threatened when the government seeks to destroy the sacred sites which are part of our religious ceremonies but that are now located on land taken by the government. These sites were there and were part of our beliefs and practices long before they became government land.

I think it is also important for you to know that for all of my adult life I have depended upon the timber industry for my livelihood. Except for the 3 years I spent with the U.S. Army Airborne, since I was 16 years old I have worked in the woods as a logger. For the past 6 years I have been a contract timber faller on tribal, private and government lands in northwestern California. Much of my work involves falling timber on federal land - principally the national forests located in our area.

It is wrong for the government to ~~know that~~ an area is sacred and part of a people's religious practices and tradition, and to go ahead and plan to destroy it like is the case with the G-O Road. Right now the American Indian Religious Freedom Act says it is this government's policy not to do that - that the government will respect our Indian traditional practices and act to protect them. But it has turned out that this law has "no teeth" and now the First Amendment does not either according to the Lyng case when it comes to Indian sacred sites and ceremonial practices related to the sites.

The federal government has a trust obligation to Indian people to protect their traditional practices and not act to destroy them. This is a legal and moral obligation, and I know Indian people commend the Congress for recognizing this and seeking to amend the American Indian Religious Freedom Act. At a minimum the American Indian Religious Freedom Act should provide for a legal right to go to court to protect our practices if need be. A right without the ability to protect it or enforce it is of little meaning. Also, any law that is passed must have the intent and effect of actually protecting our right to continue to practice our traditional beliefs and practices; anything less would again offer the same empty promise that the American Indian Religious Freedom Act now does. Therefore, ~~any amendment cannot~~ include exceptions such as those present in S. 1124 as now written because they eat up any protection it might otherwise offer Indian people.

I appreciate the opportunity to be here today and I will be pleased to answer questions you may have.

October 13, 1989

The Honorable John McCain
United States Senator
Senate Select Committee on Indian Affairs
Washington, D. C. 20510-6450

RE: September 28, 1989 S.1124
Hearings on Amendments

Dear Senator McCain;

This letter is in follow up to the committee's hearings held on September 28, 1989 regarding S 1124 the American Indian Religious Freedom Act of 1989.

As stipulated, I indicated that I would be submitting under separate cover supplementary testimony regarding specific recommendations on S 1124.

The following sets forth my reply to your letter dated October 2, 1989 and related concerns;

1.) Has the Yurok Tribe been contacted by the National Park Service for information for the development of their ethnographic data base?
Reply: No, the Yurok TRIBE has not been contacted by the National Park Service because the tribe was not formally recognized. However, the Yurok Transition Team, more recently, has been contacted. Since 1978, Yurok people have been consulted by National Park Service Staff for information about traditional sacred places of present concern in Redwood National Park. The Park contains lands within traditional Yurok territory. A number of Yurok sacred places within the National Park and adjoining State Park Lands were identified by Yurok people at meetings held in 1978 by the Park Service. This Yurok ethnographic database is housed in the office of the Redwood National Park archaeologist, in Arcata. Also, in 1978, the Park established a number of Native American advisory committees to facilitate regular interactions between Yurok, Tolowa and Hupa/Chilula people and the Park Service about Park actions which might affect sacred places. Park Service consultations with these advisory committees have been fairly regular since 1978. Yurok and other advisory committees have provided input on the draft NPS Native American Relationships Management Policy, many of which were incorporated into the final policy (see attachment).

2.) How could the collection of this information be best achieved by the National Park Service? Who should be contacted to provide information on the Yurok Tribe for religious site information and practices?
Reply: The federal government must provide us with direct notice and information in time for us to respond before forming plans by ANY public agency for development of public lands which may affect sacred lands and practices, preferably as soon as it appears likely that such interference may take place. Elders and leaders of all tribes presently or historically residing in the area should be brought in to the process, along with religious leaders, state Indian commissions, and organized Indian groups. There should be some means provided for negotiating and arbitrating these matters where consultation does not take care of the problems. Tribes should be able to make their own action plans which the U. S. would take into consideration. Each public agency should have an Indian Advisory Committee.
1/Develop prototype "MIS" gathering data base for tribal specific/site specific tribal sensitive areas by region for the Park Service and the Forest Service. 2/By public notice in the local papers and other media, including Indian newsletters and the like, requesting input from the local Indian communities. 3/ By establishing in each federal agency an advisory committee for the consultation and oversight of federal policy where Indian tribes may be impacted through an adverse federal action.4/ By allowing each agency under this act to directly consult tribes regarding their vested interest in sacred areas that may be impacted by a federal action.

The Yurok Transition Team as authorized under PL 100-580, the Hoopa/Yurok Settlement Act should be contacted on these matters, as well as recognized Yurok Traditional Spokesperson(s), and the California Native American Heritage Commission, and those tribes that have availed sensitive site location information to the Commission.

National Register Bulletin 38, U. S. D.I./N.P.S., I.R.D. contains "Traditional Cultural Properties: Guidelines for Evaluation (Parker and King), and this should offer some useful direction. See also, Fed. Register, Vol. 52, No. 183, Tues., Sept. 22, 1987 (Notices), pp. 35675-35678. "Native American Relationships Management Policy; Final Management Policy" also is important.

3.) In your testimony you have stated that you do not like the exceptions contained in S. 1124. Are there any circumstances or situations where an exception should exist?

Reply:No. The land management policies of the United States government would not be affected by S.1124 if these exceptions were allowed. For a start, the "indispensability standard" imposes an a heavy burden on the Indian spiritual person, because it requires a showing of destruction of the religion as a condition of protection; on the other hand, without explaining what actions are "necessary," the bill would allow the government to say that its actions are "necessary" to carry out "legal responsibilities" or to protect a vested property right. The government should have to prove its interest is compelling, and not be allowed to simply state that it has concerns for national health and safety or welfare in general terms, and that their actions are therefore warranted.

In the case of any other religions, under the First Amendment, the government would have to.show a compelling interest to take such steps, and show that the government has chosen actions which intrude the least on the religious observances. Short-range legal requirements or property rights should not be allowed to have a continuing, much less a permanently destructive impact on American Indian religions. Unless the government must show a compelling interest in order to impose changes on living American Indian religions, there will be no protection under this bill. Federal land should not be managed in a way that would infringe on our free exercise of religious practice by stopping our access to sites, or changing or disturbing sites which we use for rituals or ceremonies which we perform in the practice of our religion.

4.) In your testimony you have also suggested that there is a California statute that protects Native American religious sites. In your opinion, does California state law adequately protect native religious practices in the state? What is the citation of this statute?
Reply:No. California Public Resources Code Sec. 5097.91-et.seq. established the Native American Heritage Commission, and though it provides at 5097.95 that all State and local agencies shall cooperate with the Native American Heritage Commission in carrying out its responsibilities, but most often these agencies tend to treat the requirement of cooperation as merely directory.
Reply: to 2/ A copy of this state statute has been requested for the committee/s records.

5./ Your testimony as well as the testimony of other witnesses, suggests problems with regard to agency record keeping. What specific record keeping or

documentation problems has the Yurok tribe experienced in the administrative process?
Reply: Local federal agency records are purged periodically thus they become subject to the new incoming agency/ directors priorities. 2/ Agency actions (BIA) on behalf of the Yurok people have often been contrary to the position that would have benefited the Yuroks. These adverse position's favored the federal government thus fostering a position of conflict of interest. 3/ Until enactment of PL 100-580 the Yurok people were without essential record keeping office/personal support services.

6.) Do you feel there is enough similarity between Federal agencies, such as BLM, the Forest Service and the Park Service to warrant the development of uniform regulations and administrative process to ensure the protection of Native American Religious and religious practices?
Reply: Yes
2/ Special attention is essential where agency policy lacks monitoring and financial resource support that would adequately permit mid-level managers to timely input and address site specific infractions.

7.) Would your concerns regarding section 3(b) (1) which exempts decisions which are necessary "to carry out legal responsibilities of the federal government" be alleviated if the language was amended to read " to perform an act required by an Act of Congress"?
Reply:No; and see my answer to Question 3, above.

The following statements are the additions to the testimony that I made before your committee on September 28, 1989. I would like to see S.1124 incorporate the following recommendations:

1) S.1124 language should compel federal agencies to adopt uniform codes that establish prescriptions that set forth consultation procedures that adequately address regional concerns as they arise.Each tribe has its sacred burial and religious sites identified. The tribes religious site areas have been in use and existence since time immemorial.

1

2) Section 3 (b)(1)(a) language acts as a loophole for government. This specific language sets the stage for classic conflict of interest cases and needs to be stricken.

3) Federal agencies under this act should be compelled to maintain essential records maintenance procedures relative to key land use and management decisions that

would have the potential affect of impacting tribal religious areas.

4) The language used regarding an agency and its approach to taking a course of action that is least intrusive under Sec.3.(2) is very ambiguous. It in affect establishes the federal government's right to regulate tribal religion by codification or federal regulation codes. Tribal religion should not have any competing interest. Tribal spiritual and religious practices can't be relegated away, nor can the federal government by a feasibility study establish that the tribes religion and religious practices are quantifiable therefore a quantifiable practice that ought to be allowable under federal regulations. This section should be stricken.

5) Section 3.(3) is an open door to allow any agency and or interest group access to sacred tribal ceremonial lands by simply making application for and entry to public lands held by the federal government.

6) Section 3.(3)(c)(1) as printed in the FR, this appears to be intended to read, "protect a vested interest, or . . .," but it says "protest a vested property interest, or . . ." For specific comments, see my answer to Question 3, above.

Respectfully Submitted,

[illegible] for Walter Lara Sr.

Walt Lara, Sr.
P.O. Box 516
Trinidad, CA 95570

ATTACHMENT: Walt Lara, Sr.
statement

federal register

Tuesday
September 22, 1987

Part III

Department of the Interior

National Park Service

Native American Relationships Managment Policy; Final Management Policy

Native American Relationships

I. Introduction
  A. Philosophy
  B. Legislation
  C. Application
II. Explanation of Terms
III. Native American Traditional Activities
  A. Practice of Native American Religion
  B. Access and Use
    1. Access
    2. Use
  C. Taking of Natural Resources
    1. Plants, Fish and Wildlife
    2. Other Natural Resources
  D. Traditional Sacred Resources
    1. Identification and Protection
    2. Burial and Cemetery Sites
IV. Planning, Resources Management, and Operation
  A. Native American Involvement and Consultation
V. Research and Interpretation
  A. Archeological and Ethnographic Studies
  B. Museum Collections
  C. Interpretation

The National Park Service, to the extent consistent with each park's legislated purpose, shall develop and execute its programs in a manner that reflects knowledge of and respect for the cultures, including religious and subsistence traditions, of native American tribes or groups with demonstrable ancestral ties to particular resources in or within the National Park system. Such ties shall be established through evidence from systematic archeological or ethnographic studies, including ethnographic oral history and ethnohistory studies, or a combination of these sources.

I. Introduction

A. Philosophy

In many units of the National Park System (System), the National Park Service (Service) is specifically charged with the mission to preserve and interpret the cultural heritage of Native American tribes or groups. In addition, many units contain natural resources as well as features of the built environment, objects and structures that are associated with traditional sacred, subsistence or other cultural practices of contemporary Native American peoples, and necessary for their cultural continuity. Service plans, programs and activities all have the potential to affect such places and resources, and the cultural activities associated with them. Implementation of this policy is meant to ensure that (1) the Service's general regulations on access to and use of park natural and cultural resources are applied in an informed and balanced manner that does not unreasonably interfere with Native American use of traditional areas or sacred resources nor result in degradation of unit resources, (2) Service managers establish and maintain effective consulting relationships with potentially affected Native American tribes and groups, and (3) management decisions will consider the concerns of potentially affected Native American tribes or groups.

B. Legislation

Numerous laws, Executive Orders, treaties, and cooperative agreements provide for assistance, give rights of use to resources administered by the Service or define relationships between the Service and Native Americans. In addition to the National Park Service Organic Act of 1916, and park-specific enabling legislation, the following are some of the principal documents that will affect the implementation of this policy:

Antiquities Act of 1906 (Pub. L. 209) as amended.
Historic Sites Act of 1935 (Pub. L. 74-292).
National Historic Preservation Act of 1966 (Pub. L. 89-665, as amended by Pub. L. 91-423, Pub. L. 94-422, Pub L. 94-458 and Pub L. 96-515).
National Environmental Policy Act of 1969 (Pub. L. 91-190).
Endangered Species Act of 1973 (Pub. L. 93-205, as amended by Pub. L. 94-325, Pub. L. 94-359).
The American Indian Religious Freedom Act of 1978 (Pub. L. 95-341).
The Archaeological Resources Protection Act of 1979 (Pub. L. 96-95).
Alaska National Interest Lands Conservation Act of 1980 (Pub. L. 96-487).
Museum Properties Management Act of 1955 (Pub. L. 84-127).

E.O. 11593 Protection and Enhancement of the Cultural Environment (1971)
36 CFR Chapter 1, National Park Service Department of the Interior
40 CFR Parts 1500 through 1517 Council on Environmental Quality
43 CFR Part 7 Archeological Resources Protection Act of 1979 Final Uniform Regulations
National Park Service *Management Policies* 1978
NPS-28 National Park Service *Cultural Resources Management Guideline* Release No. 3, August 1985
National Park Service *Museum Handbook*

C. Application

This policy applies only to those groups specified in Section II.

II. Explanation of Terms

For purposes of this policy, the term "Native American" applies to American Indians including Carib and Arawak, Eskimo and Aleut; Native Americans of the Pacific Islands including Native Hawaiians, Native Samoans, Chamorros and Carolinians.

"Tribe or Group" applies to any Nation, tribe, band or group of Native Americans recognized in statute or treaty by Federal or State governments or any group of Native Americans not recognized in statute or treaty by Federal or State governments but identified by themselves and known by others as members of a named cultural unit that historically has shared linguistic, cultural, social (kinship) and related characteristics that distinguish it ethnically from other Native American groups. "Tribe or group" does not apply here to Native Americans of diverse cultural backgrounds (pan-tribal organizations) who voluntarily associate together for some purpose or purposes.

"Sacred Resources" applies to traditional sites, places or objects that Native American tribes or groups, or their members, perceive as having religious significance.

"Traditional" applies to beliefs and behaviors that have been transmitted across generations, and are identified by their Native American practitioners to be necessary for the perpetuation of their cultures. Characteristically, cultural practices are so interrelated that religious activities are not totally separable from subsistence, family life or other feature. Traditional also applies to the sites, objects, or places intimately associated with those beliefs or behaviors.

"Ethnographic resource" refers to park resources with traditional subsistence, sacred ceremonial or religious, or other cultural meaning for contemporary Native Americans.

"Historic" refers to prehistoric, ancestral, or traditional relationships, practices, or cultural resources that demonstrate cultural significance or persistence over time, as evidenced by archeological and ethnographic studies, including oral histories and ethnohistories.

III. Native American Traditional Activities

A. Practice of Native American Religion

Public Law 95-341, the American Indian Religious Freedom Act, enacted on August 11, 1978, states that "henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." This statute does not create additional rights or change existing authorities. It has, however, led Federal agencies to develop policies that managers become informed about Native American religious culture, consult Native Americans about religious effects of proposed actions, and avoid unnecessary interference with traditional religious practices that Federal undertakings might affect. Agency decision-making regarding Native American access to and use of traditional sacred resources for customary ceremonials should reflect the least restrictive regulatory means available.

The non-drug use of peyote for ceremonial purposes is limited to members of the Native American Church during religious ceremonies. The following holds in accord with regulations of the Department of Justice, Drug Enforcement Administration: 21 CFR 1307.31, Special Exempt Persons, Native American Church:

> The listing of peyote as a controlled substance in Schedule 1 does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of the law.

B. Access and Use

1. Access

The Superintendent shall provide reasonable access to Native Americans for pursuit of religious activities in National Park Service areas to the extent permitted by provisions of NPS *Management Policies* on Religious Activities VII-18 and Public Assembly VII-21 to 23. When appropriate, a permit may be required in accord with 36 CFR 2.50 "Special Events" or 2.51 "Public Assemblies, Meetings."

Native Americans may obtain a waiver of fees from the Superintendent when making a non-recreational visit to a unit of the National Park System for religious or other traditional purposes.

2. Use

Members of Native American tribes or groups shall be permitted to perform traditional religious or other customary activities at places within park areas which have been used historically for such purposes, in accordance with the principles stated in section A and B.1 above and the limitations noted in section C. Native Americans may enter and camp overnight for the duration of religious ceremonies without entrance and camping fees.

Use of non-historical or non-traditional locations, and activities that physically impact park resources, shall be subject to regulations in 36 CFR Part 1, General Provisions, and 36 CFR Part 2, Resource Protection, Public Use and Recreation. Superintendents may require a permit in accord with 36 CFR 2.50 or 2.51. Performance of a traditional ceremony or the conduct of a religious activity at a particular place shall not form the basis for prohibiting others from using such areas.

Native Americans seeking to use park areas under this section should consult with the park Superintendent about the proposed activity, orally or in writing. The denial of permission to carry out the activity or the imposition of any condition thereon may be appealed by the applicant to the Regional Director.

C. Taking of Natural Resources

1. *Plants, Fish and Wildlife*

The taking of fish and wildlife, by Native Americans, for the pursuit of traditional subsistence or religious activities is permitted when authorized by law or existing treaty rights, or in accord with 36 CFR 2.1 to 2.3 and National Park Service *Management Policies*, IV-3 to IV-11.

Disposal of surplus wildlife and carcasses shall continue as outlined in NPS *Management Policies* IV-10, with preference given to Native American groups.

Gathering of plants that are controlled substances is permitted when in accord with the exemption noted in 21 CFR

1307.31 regarding peyote for use by the Native American Church.

2. Other Natural Resources

In accord with 36 CFR 2.1(c)(1) the Superintendent may designate certain fruits, berries, nuts or unoccupied seashells that can be gathered by hand for personal use or consumption upon a written determination that the gathering or consumption will not adversely affect park wildlife, the reproductive potential of a plant species, or otherwise adversely affect park resources. The collection of minerals and rocks is permitted when authorized by law or treaty rights, or in accord with NPS regulation.

D. Traditional Sacred Resources

1. Identification and Protection

The Service shall establish and maintain consultative relationships with Native American groups who have historical ties to specific park lands, to discuss their concerns about protection for and access to sacred resources, including sites, places, or objects under Service stewardship. To the extent consistent with legislation and Service capabilities, the Service will provide for the protection of sacred resources in a manner consistent with the goals of the associated Native American group.

Under the provisions of the Archaeological Resources Protection Act of 1979, and the 1966 National Historic Preservation Act, as amended, information on the location and character of qualified sites is excepted from public disclosure under the Freedom of Information Act. Undertakings affecting properties that are on or eligible for inclusion on the National Register of Historic Places shall comply with current procedures of the Advisory Council on Historic Preservation.

2. Burial and Cemetery Sites

Historic or prehistoric Native American Burial areas whether or not formally plotted and enclosed as cemeteries shall be located, identified and appropriately protected to the extent practicable. Burial areas generally shall not be disturbed, destroyed, or archeologically investigated unless there are no feasible and prudent alternatives, consistent with the Guidelines for the Disposition of Human Remains, NPS–28, Technical Supplement, Chapter 7.

The Service will consult appropriate Native American individuals and groups concerning the proper treatment and disposition of human remains historically or prehistorically associated with such individuals or groups, when such remains may be disturbed or encountered as a result of activities carried out on National Park System lands. The Service shall make every reasonable effort to consult individuals presently linked to the disturbed sites by ties of kinship or culture when ethnically identifiable remains are encountered. The objective of consultation will be to acquire data needed for informed decisions concerning the treatment and/or disposition of the remains.

In reaching its decision, the Service will consider the preferences of Native American consultants and any existing formal burial policy established by the tribe to the maximum extent feasible under current law. Park managers shall also acquire the recommendations of Service archeologists as well as applied anthropologists or ethnographers and, if circumstances require it, representatives from the State Historic Preservation Office and the Advisory Council on Historic Preservation.

Management decisions shall give full consideration to the following range of principal decision alternatives:

—Redesign of project to avoid disturbance of interment.
—Removal of remains and reburial without recordation and study.
—Removal of remains and reburial with limited recordation and study.
—Removal of remains and reburial with full recordation and study.
—Removal of remains, full recordation and study, and retention of remains as part of the Service museum collection.

IV. Planning, Resources Management, and Operation

A. Native American Involvement and Consultation

The Service shall implement a consultation program conforming to NPS–28, "Cultural Resources Management Guidelines," Technical Supplement, Chapter 7, (Ethnographic Program) August 1985. The program shall promote and provide for regular active consultation with Native American groups in planning, management, and operations decisions that affect the subsistence and sacred materials or places, or other ethnographic resources with which the group is historically associated.

Superintendents shall maintain a current roster of potential consultants from the associated groups, and meet with individuals on the list as well as with other members of the tribe or group as the need arises. Consultation shall occur at the earliest practicable time, as soon as a need is defined or an action is foreseeable, and continue through all phases of decision-making. The Service shall seek the broadest feasible range of views from members of the involved group, while recognizing that it must also respect the views of the group's tribal chair or other formal leaders. The Service shall become informed about the diverse views held by people who differ in age, sex, and technical and religious expertise and consider these in formulating alternative actions or reaching decisions affecting their traditional interests in resources or programs within the park.

While the NPS shall seek the broadest feasible spectrum of views, it will negotiate legal issues with individuals selected or approved by the group or tribe, and empowered to speak or act on its behalf, when matters concern the larger group. Individual concerns will be considered on a case by case basis.

Documentation of the decision-making process and the final decision, whether or not carried out under the National Environmental Policy Act (NEPA), shall be made available to the consulting group by the Superintendent or Regional Director. Although final decisions in all cases shall consider the results of consultations, the authority and the responsibility for the decision rests with the Service.

V. Research and Interpretation

A. Archeological and Ethnographic Studies

In some instances differences may arise between the NPS and Native Americans over the National Park Service's need to know and understand current and past lifeways and the Native Americans' need to protect from desecration and public knowledge their religious or other cultural values and practices. This is further complicated by the fact that some information acquired by the National Park Service is used in public programs that interpret cultural and national resources. Studies in archeology, ethnography, history, or other discipline carried out or sponsored by the National Park Service shall reflect sensitivity to the privacy of community consultants regarding their practices, beliefs, and identities, and follow the relevant procedures noted in NPS–28, *Cultural Resources Management Guideline* August 1985.

B. Museum Collections

In acquiring, maintaining, using and disposing of museum collections associated with a particular Native American tribe or group, the Service will carry out consultations in accordance with section IV. A. above.

The Service shall acquire only collections having a legal and ethical pedigree in accord with existing laws, Service *Management Policies*, and implementing guidelines and standards. Objects from museum collections may be loaned, exchanged or disposed of in accordance with the Museum Properties Management Act, 43 CFR 7.13, other applicable laws, and the NPS *Museum Handbook*.

The Service shall repatriate artifacts and specimens only when otherwise lawful and it can be shown by a Native American tribe or group that the material is their inalienable communal property. Requests for repatriations must be made by the representatives selected by the tribe or group and empowered to act on its behalf. Requests and conditions of repatriation shall be considered by the Service only on a case by case basis.

Interested persons shall be able to inspect or study Service artifacts, specimens and museum records consistent with standards for the use and preservation of collections.

C. Interpretation

The Service shall actively seek Native American consultation in the planning, development, and operation of park interpretive programs that relate to the culture and history of the particular tribe or group, shall develop cooperative programs with tribes and groups to assist the Service in the interpretation of their cultural heritage in parks, and shall provide for presentation of Native American perspectives of their own lifeways and resources, both cultural and natural. Ethnographic or cultural anthropological data and concepts will also be used as appropriate.

To avoid ethnocentrism, the Service will present factual, balanced and, to the extent achievable, value-neutral presentations of both Native American and non-Native American cultures, heritage and history.

The Service shall not display disinterred skeletal or mummified human remains or grave goods and other objects that Native Americans, culturally associated with them, regard as traditionally sacred. Consultation with associated Native Americans will precede the display of any object, the sacred nature of which is suspected, but not confirmed, to determine its religious status before selecting an appropriate course of action.

Denis P. Galvin,

Acting Director.

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ATTACHMENT: Walt Lara, Sr. statement

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·NATIONAL REGISTER·
BULLETIN

Technical information on comprehensive planning, survey of cultural resources, and registration in the National Register of Historic Places

U.S. Department of the Interior
National Park Service
Interagency Resources Division

DRAFT

TRADITIONAL CULTURAL PROPERTIES
Guidelines for Evaluation

By Patricia L. Parker and Thomas F. King[1]

Introduction

The National Register of Historic Places contains a wide range of historic property types, reflecting the diversity of the nation's history and culture. Buildings, structures, and sites; groups of buildings, structures or sites forming historic districts; landscapes, and individual objects are all included in the Register if they meet the criteria specified in the National Register's *Criteria for Evaluation* (36 CFR §60.4). Such properties reflect many kinds of significance -- in architecture, history, archeology, engineering, and culture.

There are many definitions of the word "culture," but in the National Register programs the word is understood to mean the traditions, beliefs, practices, lifeways, arts, crafts and social institutions of any community, be it an Indian tribe, a local ethnic group, or the people of the nation as a whole.

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One kind of cultural significance a property may possess, and that may make it eligible for inclusion in the Register, is *traditional cultural significance*: that is, significance derived from the role the property plays in the traditional but often continuing lifeways of a community. Examples of properties possessing such significance include:

- a location associated with the traditional beliefs of a Native American group about its origins, its cultural history, or the nature of the world;

- an urban neighborhood that is the traditional home of a particular ethnic or other cultural group, and that reflects its beliefs and practices;

- a location where Native American religious practitioners have historically gone, and may still go, to perform ceremonial activities in accordance with traditional cultural rules of practice; and

- a location where a community has traditionally carried out economic, artistic, or other cultural practices important in maintaining its historical identity.

These and other examples will be discussed and illustrated later in this bulletin.

[PHOTO: HELKAU H.D.]

Properties having traditional cultural values are often hard to identify. A traditional ceremonial location may look like merely a mountaintop, a lake, or a stretch of river; a culturally important neighborhood may look like any other aggregation of houses, and an area where culturally important economic or artistic activities have been carried out may look like any other building, field of grass, or piece of forest in the area. As a result, such places may not necessarily come to light through the conduct of archeological, historical, or architectural surveys. The existence and significance of such locations often can be ascertained only through interviews with knowledgeable users of the area, or through other forms of ethnographic research. The subtlety with which such a locations' significance may be indicated makes it easy for them to be ignored; on the other hand it makes it difficult to distinguish between properties having real significance and those whose putative significance is spurious. As a result, clear guidelines for evaluation of such properties are needed.

In the 1980 amendments to the National Historic Preservation Act, the National Park Service, with the American Folklife Center, was directed to study means of:

> "preserving and conserving the intangible elements of our cultural heritage such as arts, skills, folklife, and folkways...."

and to recommend ways to:

> "preserve, conserve, and encourage the continuation of the diverse traditional prehistoric, historic, ethnic, and folk cultural traditions that underlie and are a living expression fo our American heritage. (NHPA §502; 16 U.S.C. 470a note).

The report that was prepared in response to §502, entitled *Cultural Conservation,* was submitted to the President and Congress on June 1, 1983 by the Secretary of the Interior. The report recommended in general that traditional cultural resources, both those that are associated with historic properties and those without specific property referents, be more systematically addressed in implementation of the National Historic Preservation Act and other historic preservation authorities. In transmitting the report, the Secretary directed the National Park Service to take several actions to implement its recommendations. Among other actions, the Service was directed to prepare guidelines to assist in the documentation of intangible cultural resources, to coordinate the incorporation of provisions for the consideration of such resources into Departmental planning documents and administrative manuals, and to encourage the identification and documentation of such resources by States and Federal agencies.

This bulletin has been developed as one aspect of the Service's response to the *Cultural Conservation* report and the Secretary's direction. It is intended to be an aid in determining whether properties thought or alleged to have traditional cultural significance are eligible for inclusion in the National Register. It is meant to assist Federal agencies, State Historic Preservation Officers, Certified Local Governments, Indian Tribes, and other historic preservation practitioners who need to evaluate such properties when nominating them for inclusion in the National Register or when considering their eligibility for the Register as part of the review process prescribed by the Advisory Council on Historic Preservation under Section 106 of the National Historic Preservation Act.

Ethnography, Ethnohistory, Ethnocentrism

Three words beginning with "ethno" will be used repeatedly in this Bulletin, and may not be familiar to all readers. All three are derived from the Greek *ethnos*, meaning "nation," and are widely used in the study of anthropology and related disciplines.

Ethnography is the descriptive and analytic study of the culture of particular groups or communities. **Ethnohistory** is the study of historical data, including but not necessarily limited to documentary data, pertaining to a group or community, using an ethnographic perspective. Ethnographic and ethnohistorical research are usually carried out by specialists in anthropology, folklore, sociology, and related disciplines.

Ethnocentrism means viewing the world and the people in it only from the point of view of one's own culture, and being unable to sympathize with the feelings, attitudes, and beliefs of someone who is a member of a different culture. It is particularly important to understand, and seek to avoid, ethnocentrism in the evaluation of traditional cultural properties. For example, Euroamerican society tends to emphasize "objective" observation of the physical world as the basis for making statements about that world. However, it may not be possible to use such observations as the major basis for evaluating a traditional cultural property. For example, there may be nothing observable to the outsider about a place regarded as sacred by a Native American group. Similarly, such a group's belief that its ancestors emerged from the earth at a specific location at the beginning of time may contradict Euroamerican science's belief that the group's ancestors migrated to North America from Siberia. These facts in no way diminish the significance of the locations in question in the eyes of those who value them; indeed they are irrelevant to their significance. It would be ethnocentric in the extreme to say that "whatever the Native American group says about this place, I can't see anything here so it is not significant," or "since I know these people's ancestors came from Siberia, the place where they think they emerged from the earth is of no significance." It is vital to evaluate properties thought to have traditional cultural significance from the standpoint of those who may ascribe such significance to them, whatever one's own perception of them, based on one's own cultural values, may be.

Traditional Cultural Values in Preservation Planning

The *Secretary of the Interior's Standards for Preservation Planning* provide for the establishment of "historic contexts" as a basic step in any preservation planning process -- be it planning for the comprehensive survey of a community or planning a construction project. A historic context is an organization of available information about, among other things, the cultural history of the area to be investigated, to identify "the broad patterns of development in an area that may be represented by historic properties" (48 FR 44717). The traditions and traditional lifeways of a planning area may represent such "broad patterns," so information about them should be used as a basis for historic context development.

The *Secretary of the Interior's Guidelines for Preservation Planning* emphasize the need for organized public participation in context development (48 FR 44717). The Advisory Council on Historic Preservation's *Guidelines for Public Participation in Historic Preservation Review* (ACHP 1988) provide detailed recommendations regarding such participation. Based on these standards and guidelines, groups that may ascribe traditional cultural values to an area's historic properties should be contacted and asked to assist in organizing information on the area. Historic contexts should be considered that reflect the traditional values of such groups.

[PHOTO: ETHNOGRAPHER IN FIELD

Identifying Traditional Cultural Properties

Some traditional cultural properties are well known to the residents of an area. The San Francisco Peaks in Arizona, for example, are extensively documented and widely recognized as places of extreme cultural importance to the Hopi, Navajo, and other American Indian people of the Southwest, and it requires little study to recognize that Honolulu's Chinatown is a place of cultural importance to the city's oriental community. Most traditional cultural properties, however, must be identified through systematic study, just as most other kinds of historic properties must be identified. This section of this Bulletin will discuss some factors to consider in identifying traditional cultural properties[2].

[PHOTOS HERE: SAN FRANCISCO PEAKS, HONO. CHINATOWN]

Establishing the level of effort.

Any comprehensive effort to identify historic properties in an area, be the area a community, a rural area, or the area that may be affected by a construction or land-use project, should include a reasonable effort to identify traditional cultural properties. What constitutes a "reasonable" effort depends in part on the likelihood that such properties may be present. The likelihood that such properties may be present can be reliably assessed only on the basis of background knowledge of the area's history, ethnography, and contemporary society developed through preservation planning. As a general though not invariable rule, however, rural areas are more likely than urban areas to contain properties of traditional cultural importance to American Indian or other native American communities, while urban areas are more likely to contain properties of significance to ethnic and other traditional neighborhoods.

Where identification is conducted as part of planning for a construction or land-use project, the appropriate level of effort depends in part on whether the project under consideration is the type of project that could affect traditional cultural values. For example, the rehabilitation of historic buildings, on the whole, may have relatively little effect on traditional cultural values. However, if a rehabilitation project will result in substantial social change in a neighborhood or community, for example through displacement of social groups or "gentrification," the potential for affecting traditional cultural values may be high. Similarly, most day-to-day management activities of a land managing agency may have little potential for effect on traditional cultural properties, but if the management activity involves an area or a kind of resource that has high significance to a traditional group -- for example, timber harvesting in an area where an Indian tribe's religious practitioners may continue to carry out traditional ceremonies -- the potential for effect will be high.

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[2] For general guidelines for identification see *The Secretary of the Interior's Standards and Guidelines for Identification* (48 FR 44720-23), *Guidelines for Local Surveys: A Basis for Preservation Planning* (National Register Bulletin 24), and *Identification in Historic Preservation Review: a Decisionmaking Guide*(ACHP/DOI 1988).

These general rules of thumb aside, the way to determine what constitutes a reasonable effort to identify traditional cultural properties is to consult those who may ascribe cultural significance to such properties. The need for public participation in planning identification, as in other forms of preservation planning, cannot be overemphasized.

Contacting traditional communities and groups

Public participation in preservation planning of any kind, including planning an identification effort, naturally begins with the identification of groups and individuals who have special knowledge about and interests in the area's historic properties. In the case of traditional cultural properties, this means those individuals and groups who may ascribe traditional cultural significance to such properties, and those who may have knowledge of such individuals and groups.

Background research

An important first step in identifying such individuals and groups is to conduct background research into what is already recorded about the area's history, ethnography, sociology, and folklife. Published and unpublished source material on the historic and contemporary composition of the area's social and cultural groups should be consulted, as should professional and nonprofessional students of the area's social and cultural groups.

Contacting knowledgeable parties

Another important step, of course, is to contact knowledgeable groups and individuals directly, particularly those groups that are native to the area or have resided there for a long time. Some such groups have official representatives -- the tribal council of an Indian tribe, for example, or an urban neighborhood council. In other cases, leadership may be less officially defined, and establishing contact may be more complicated. Consultation with ethnographers, sociologists, folklorists, and others who may have conducted research in the area or otherwise worked with its social groups may be important in such cases.

It should also be recognized that expertise in traditional cultural values may not be found, or not found solely, among contemporary community leaders. In some cases, in fact, the current political leadership of a community or neighborhood may be hostile to or embarrassed about traditional matters. As a result, it may be necessary to seek out knowledgeable parties outside the community's official political structure. Naturally this should be done with the full knowledge of the community's contemporary leaders; in most cases it is appropriate to ask such leaders to identify members of the community who are knowledgeable about traditional cultural matters, and use these parties as an initial network of consultants on the group's traditional values.

[SMALL PHOTO-ESSAY: RAINBOW FALLS ET AL]

Fieldwork

Fieldwork to identify properties of traditional cultural significance involves consultation with knowledgeable parties, and field inspection/recordation of locations identified as significant by such parties. It is often appropriate, and efficient, to combine such fieldwork with surveys to identify other kinds of historic properties, for example archeological sites and properties of architectural significance.

Culturally sensitive consultation

Since knowledge of traditional cultural values may not be readily shared with outsiders, knowledgeable parties should be consulted in cultural contexts that are familiar and reasonable to them. This may require the use of languages other than English, the conduct of community meetings in ways consistent with local traditional practice, and the conduct of studies by trained ethnographers, ethnohistorians, sociologists, or folklorists.

Field inspection and recordation

It is usually important to take knowledgeable consultants into the field to inspect properties that they identify as significant. In some cases such properties may not be discernable as such to anyone but a knowledgeable member of the group that ascribes significance to them; in such cases it may be impossible even to find the relevant properties, or locate them accurately, without the aid of such parties. Even where a property is readily discernable as such to the outside observer, visiting the property may help a consultant recall information about it that he or she is unlikely to recall during interviews at a remote location, thus making for a richer and more complete record.

Where the property in question has religious significance or supernatural connotations, it is particularly important to ensure that any visit is carried out in accordance with appropriate modes of behavior. In some cases, ritual purification is necessary before a property can be approached, or spirits must be propitiated along the way. Some groups forbid visits to such locations by menstruating women, or by people of inappropriate ages. The taking of photographs or the use of electronic recording equipment may not be appropriate. Appropriate ways to approach the property should be discussed with knowledgeable consultants before undertaking a field visit.

To the extent feasible given the cultural norms of the group involved, traditional cultural properties should be recorded on National Register of Historic Places forms or their equivalent[3]. Where items normally included in a National Register nomination or request for a determination of eligibility cannot be included (for example, if it is culturally inappropriate to photograph the property), the reasons for not including the item should be explained. To the extent possible in the property's cultural context, other aspects of the documentation (for example, verbal descriptions of the property) should be enhanced to make up for the items not included.

If making the location of a property known to the public would be culturally inappropriate, or compromise the integrity of the property or associated cultural values (for example, by encouraging tourists to intrude upon the conduct of traditional practices), the "Not for Publication" box on the National Register form should be checked; this indicates that the reproduction of locational information is prohibited, and that other information contained in the nomination will not be reproduced without the permission of the nominating authority. In the case of a request for a determination of eligibility in which a National Register form is not used, the fact that the information is not for publication should be clearly specified in the documentation, so that the National Register can apply the same controls to this information as it would to restricted information in a nomination[4].

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[3] For general instructions on the completion of National Register documentation, see National Register Bulletin 16, *Guidelines for Completing National Register of Historic Places Forms*.

[4] Section 304 of the National Historic Preservation Act provides the legal authority to withhold National Register information from the public when release might "create a substantial risk of harm, theft, or destruction." For detailed guidelines concerning restricting access to information

Reconciling sources

Sometimes an apparent conflict exists between documentary data on traditional cultural properties and the testimony of contemporary consultants. The most common kind of conflict occurs when ethnographic and ethnohistorical documents do not identify a given place as playing an important role in the tradition and culture of a group, while contemporary members of the group say the property does have such a role. More rarely, documentary sources may indicate that a property does have cultural significance while contemporary sources say it does not. In some cases, too, contemporary sources may disagree about the significance of a property.

Where available documents fail to identify a property as culturally significant, but contemporary sources identify it as such, several points should be considered.

(a) Ethnographic and ethnohistorical research has not been conducted uniformly in all parts of the nation; some areas are better documented than others simply because they have been the focus of more research.

(b) Ethnographic and ethnohistorical documents reflect the research interests of those who prepared them; the fact that one does not identify a property as culturally important may reflect only the fact that the individual who prepared the report had research interests that did not require the identification of such properties.

(c) Some kinds of traditional cultural properties are regarded by those who value them as the loci of supernatural or other power, or as having other attributes that make people reluctant to talk about them. Such properties are not likely to be recorded unless someone makes a very deliberate effort to do so, or unless those who value them have a special reason for revealing the information -- for example, a perception that the property is in some kind of danger.

Particularly because properties of traditional cultural significance are often kept secret, it is not uncommon for them to be "discovered" only when something threatens them -- for example, when a change in land-use is proposed in their vicinity. The sudden revelation by representatives of a

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see National Register Bulletin 29, *Guidelines for Restricting Location Information.*

cultural group -- which may also have other economic or political interests in the proposed change -- can lead quickly to charges that the cultural significance of a property has been invented only to obstruct or otherwise influence those planning the change. This may be true, but it also may be that until the change was proposed, there simply was no reason for those who value the property to reveal its existence or the significance they ascribe to it.

Where ethnographic, ethnohistorical, historical, or other sources identify a property as having cultural significance, but contemporary sources say that it lacks such significance, the interests of the contemporary sources should be carefully considered. Individuals who have economic interests in the potential development of an area may be strongly motivated to deny its cultural significance. More subtly, individuals who regard traditional practices and beliefs as backward and contrary to the best contemporary interests of the group that once ascribed significance to a property may feel justified in saying that such significance has been lost, or was never ascribed to the property. On the other hand, of course, it may be that the documentary sources are wrong, or that the significance ascribed to the property when the documents were prepared has since been lost.

Similar considerations must be taken into account in attempting to reconcile conflicting contemporary sources. Where one individual or group asserts that a property has traditional cultural significance, and another asserts that it does not, or where there is disagreement about the nature or extent of a property's significance, the motives and values of the parties, and the cultural constraints operating on each, must be carefully analyzed.

In general, the only reasonably reliable way to resolve conflict among sources is to interview a wide enough range of individuals, and review a wide enough range of documentary sources, to minimize the likelihood either of inadvertent bias or of being deliberately misled[5].

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[5] For excellent examples of studies designed in whole or in part to identify and evaluate traditional cultural properties based on both documentary sources and the testimony of contemporary consultants, see Bean and Vane 1978; Carroll 1983; Johnston and Budy 1983; Stoffle and Dobyns 1982a, 1982b; Theodoratus 1979.

Determining Eligibility: Step by Step

Whether a property is known in advance or found during a deliberate identification effort, it must be evaluated with reference to the National Register Criteria for Evaluation (36 CFR §60) in order to determine whether it is eligible for inclusion in the Register. This section discusses the process of evaluation as a series of sequential steps. In real life, of course, these steps are often collapsed into one another or taken in tandem.

Step One: Ensure that the entity under consideration is a property.

Because the cultural practices or beliefs that give a traditional cultural property its significance are often still observed in some form at the time the property is evaluated, it is sometimes perceived that the intangible practices or beliefs themselves, not the property, constitute the subject of evaluation. There is naturally a dynamic relationship between tangible and intangible traditional cultural resources, and the beliefs or practices associated with a traditional cultural property are of central importance in defining its significance. However, it should be clearly recognized at the outset that the National Register does not include intangible resources themselves. The entity evaluated must be a tangible property -- that is, a district, site, building, structure, or object[6]. The relationship between the property and the beliefs or practices that may give it significance should be carefully considered, however, since it is the latter that may give the property its significance.

[PHOTO: **ACTIVITIY ASSOCIATED WITH A PROPERTY – MAYBE PINELANDS**]
[PHOTO: **ACTIVITY WITHOUT PROPERTY REFERENT – MAYBE A DANCE**]

Construction by human beings is a necessary attribute of buildings and structures, but districts, sites, and objects do not have to be the products of, or contain, the work of human beings in order to be classified as properties. For example, the National Register defines a "site" as "the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself possesses historic, cultural, or archeological value regardless of the value of any existing structure[7]." Thus a property may be defined as a "site" as long as it was the location of a significant event or activity, regardless of whether the event or activity left any evidence of its occurrence. A culturally important natural landscape may be classified as a site, as may the specific location where important traditional events, activities, or cultural observances have taken place. A natural object such as a tree or a rock outcrop may be an eligible object if it is associated with an important tradition or use. A concentration, linkage, or continuity of such sites or objects, or of structures comprising a culturally important entity, may be classified as a district.

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[6] See National Register Bulletin 15, *Guidelines for Applying the National Register Criteria*, pp. 5-8 for discussion of property types.

In considering the eligibility of a property that contains no observable evidence of human activity, however, the documentary or oral evidence for the association of the property with traditional events, activities or observances should be carefully weighed and assessed. The National Register discourages the nomination of natural features without sound documentation of their historical or cultural significance.

[PHOTO: RAINBOW FALLS OR OLD MAN CAVE OR DOUBLE SPRING]

Step Two: Consider the property's integrity.

In order to be eligible for inclusion in the Register, a property must have "integrity of location, design, setting, materials, workmanship, feeling and association" (36 CFR §60). In the case of a traditional cultural property, there are two fundamental questions to ask about integrity. First, does the property have an integral relationship to traditional cultural practices or beliefs; and second, is the condition of the property such that the relevant relationships survive?

Integrity of relationship

The relationship between a property and the beliefs or practices that may give it significance is fundamental to the property's integrity of feeling and association. Assessing the integrity of this relationship involves developing some understanding about how the group that holds the beliefs or carries out the practices is likely to view the property. If the property is known or likely to be regarded by a traditional cultural group as important in the retention or transmittal of a belief, or to the performance of a practice, the property can be taken to have an integral relationship with the belief or practice, and vice-versa.

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[7] See National Register Bulletin 15, p. 41.

For example, imagine two groups living along the shores of a lake. Each group practices a form of baptism to mark an individual's acceptance into the group. Both carry out baptism in the lake. One group, however, holds that baptism is appropriate in any body of water that is available; the lake happens to be available, so it is used, but another lake, a river or creek, or a swimming pool would be just as acceptable. The second group regards baptism in the lake as essential to its acceptance of an individual as a member. Clearly the lake is integrally related to the second group's practice, but not to that of the first.

Integrity of condition

Like any other kind of historic property, a property that once had traditional cultural significance can lose such significance through physical alteration of its location, setting, design, or materials. For example, an urban neighborhood whose structures, objects, and spaces reflect the traditional cultural values of a historically important social group may lose its significance if these aspects of the neighborhood are substantially altered.

In some cases a traditional cultural property can also lose its significance through alteration of its setting, or environment. For example, a location used by an American Indian group for traditional spirit questing is unlikely to retain its significance for this purpose if it has come to be surrounded by housing tracts or shopping malls.

A property may retain its traditional cultural significance even though it has been substantially modified, however. For example, the Karuk Indians of northwestern California continue to carry on world renewal rites, ancient ceremonies featuring elaborate dances, songs, and other ritual activities, along a stretch of the Klamath River that is now the site of a highway, a Forest Service Ranger Station, a number of residences, and a timber cutting operation. Specific locations important in aspects of the ceremony remain intact, and accommodation has been reached between the Karuk and other users of the land. The State Department of Transportation has even erected "Ritual Crossing" signs at locations where the Karuk religious practitioners cross the highway, and built shallow depressions into the roadway which are filled with sand in advance of the ceremony, so the feet of the practitioners need not be profaned by contact with man-made macadam. As this example shows, the integrity of a possible traditional cultural property must be considered with reference to the views of traditional practitioners; if its integrity has not been lost in their eyes, it probably has sufficient integrity to justify further evaluation.

[PHOTO: RITUAL CROSSING SIGN]

Some kinds of traditional cultural significance also may be retained regardless of how the surroundings of a property may be changed. For example, the First African Baptist Church Cemetery in Philadelphia, rediscovered during archeological work in advance of highway construction in 1985, has considerable cultural significance for the congregation that traces descent from those interred in the Cemetery, and for Philadelphia's Black community in general, even though its graves had been buried under fill and modern construction for many decades.

[PHOTO: ABC CEMETERY]

It should also be recalled that even if a property has lost integrity as a possible traditional cultural property, it may retain integrity with reference to some other aspect of significance. For example, a property whose cultural significance has been lost through disturbance may still retain archeological deposits of significance for their information content, and a neighborhood whose traditional residents no longer ascribe significance to it may contain buildings of architectural importance.

Step Three: Evaluate the property with reference to the National Register Criteria.

Assuming the entity to be evaluated is a property, and that it retains integrity, it is next necessary to evaluate it against the four basic National Register Criteria set forth in the National Register regulations (36 CFR §§60). If the property meets one or more of the criteria, it may be eligible; if it does not, it is not eligible[8].

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[8] For general guidelines, see National Register Bulletin 15.

Criterion (a): Association with events that have made a significant contributions to the broad patterns of our history.

The word "our" in this criterion may be taken to refer to the group to which the property may have traditional cultural significance, and the word "history" may be taken to include traditional oral history as well as recorded history. For example, Mt. Tonaachaw on Moen Island in Truk, Federated States of Micronesia, is on the National Register in part because of association with oral traditions about the establishment of Trukese society.

"Events" can include specific moments in history or a series of events reflecting a broad pattern or theme. For example, the ongoing participation of an ethnic or social group in an area's history, reflected in a neighborhood's buildings, streetscapes, or patterns of social activity, constitutes such a series of events.

The association of a property with significant events, and its existence at the time the events took place, must be documented through accepted means of historical research. The means of research normally employed with respect to traditional cultural properties include ethnographic, ethnohistorical, and folklore studies, as well as historical and archeological research. Where a traditional event has an ambiguous time referent, it may be impossible, and to some extent irrelevant, to demonstrate with certainty that the property in question existed at the time the traditional event occurred. For example, events recounted in the traditions of Native American groups may have occurred in a time before the creation of the world as we know it, or at least before the creation of people. It would be fruitless to try to demonstrate, using the techniques of history and science, that a given location did or did not objectively exist in a time whose own existence cannot be demonstrated scientifically. Such a demonstration is unnecessary for purposes of eligibility determination; as long as the tradition itself is rooted in the history of the group, and associates the property with traditional events, the association can be accepted.

[PHOTO: MT. TONAACHAW]
[PHOTO: SWEET AUBURN H.D., ATLANTA]
[PHOTOS: HOPI AND MORMON PETROGLYPHS AT WILLOW SPRINGS]

Criterion (b): Association with the lives of persons significant in our past.

Again, the word "our" can be interpreted with reference to the people who are thought to regard the property as traditionally important. The word "persons" can be taken to refer both to persons whose tangible, human existence in the past can be inferred on the basis of historical, ethnographic, or other research, and to "persons" such as gods and demigods who feature in the traditions of a group. For example, Tahquitz Canyon in southern California is included in the National Register in part because of its association with Tahquitz, a Cahuilla Indian demigod who figures importantly in the tribe's traditions and is said to occupy an obsidian cave high in the canyon.

[PHOTO: TAHQUITZ]
[PHOTO: CULTURALLY DISTINCTIVE STREETSCAPE]

Criterion (c)(1):[9] Embodiment of the distinctive characteristics of a type, period, or method of construction.

This subcriterion applies to properties that have been constructed, or contain constructed entities -- that is, buildings, structures, or built objects. For example, a neighborhood that has traditionally been occupied by a particular ethnic group may display particular housing styles, gardens, street furniture or ornamentation distinctive of the group. Honolulu's Chinatown, for example, embodies the distinctive cultural values of the City's oriental community in its architecture, landscaping, signage, and ornamentation.

Criterion (c)(2): Representative of the work of a master.

A property identified in tradition or suggested by scholarship to be the work of a traditional master builder or artisan may be regarded as the work of a master, even though the precise identity of the master may not be known.

[PHOTO: CEMETERY IN HAWAI'I WITH IMPORTANT HEADSTONES (J. KNOERL FROM DON HIBBARD)]
[PHOTO: ARKANSAS SCULPTURES OF DIONICIO RODRIGUEZ]

Criterion (c)(3): Possession of high artistic values.

A property made up of or containing art work valued by a group for traditional cultural reasons, for example a petroglyph or pictograph site venerated by an Indian group, or a building whose decorative elements reflect a local ethnic group's distinctive modes of expression, may be viewed as having high artistic value from the standpoint of the group.

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[9] Note: Criterion (c) is not subdivided into subcriteria (1), (2), etc. in 36 CFR S60.4. The subdivision given here is only for the convenience of the reader.

[PHOTOS: TOTEM POLES; CHUMASH PICTOGRAPHS; PETROGLYPH CANYON, MT; POHAKA KA LUAHINE, HI]

Criterion (c)(4): Representative of a significant and distinguishable entity whose components may lack individual distinction.

A property may be regarded as representative of a significant and distinguishable entity, even though it lacks individual distinction, if it represents or is an integral part of a larger entity of traditional cultural importance. The larger entity may, and usually does, possess both tangible and intangible components. For example, certain locations along the Russian River in California are highly valued by the Pomo Indians, and have been for centuries, as sources of high quality sedge roots needed in the construction of the Pomo's world famous basketry. Although the sedge fields themselves are virtually indistinguishable from the surrounding landscape, and certainly indistinguishable by the untrained observer from other sedge fields that produce lower quality roots, they are representative of, and vital to, the larger entity of Pomo basketmaking. Similarly, some deeply venerated landmarks in Micronesia are natural features, such as rock outcrops and groves of trees; these are indistinguishable visually (at least to the outside observer) from other rocks and trees, but they figure importantly in chants embodying traditional sailing directions and lessons about traditional history. As individual objects they lack distinction, but the larger entity of which they are a part -- Micronesian navigational and historical tradition -- is of prime importance in the area's history.

[PHOTO: SEDGE FIELDS & HARVESTERS]
[PHOTO: POMO BASKET]
[PHOTO: MICRONESIAN CANOE AT SEA]

Criterion d: History of yielding, or potential to yield, information important in prehistory or history.

Properties that have traditional cultural significance often have already yielded, or have the potential to yield, important information through ethnographic, archeological, sociological, folkloric, or other studies. For example, ethnographic and ethnohistorical studies of Kaho'olawe Island in

Hawai'i, conducted in order to clarify its eligibility for inclusion in the National Register, have provided important insights into Hawai'ian traditions and culture and into the history of twentieth century efforts to revitalize traditional Hawai'ian culture.

[PHOTO: KAHO'OLAWE]
[PHOTO: NARRAGANSETT CEMETERY, RHODE ISLAND, EXCAVATED WITH APPROVAL OF TRIBAL COUNCIL AND PARTICIPATION BY MEDICINE MAN TO DETERMINE TRADITIONAL BURIAL PRACTICES IN ORDER TO REINSTATE THEM.]

Step 4: Determine whether any of the National Register criteria considerations (36 CFR §60.4) make the property ineligible.

Generally speaking, a property is not eligible for inclusion in the Register if any of the six "criteria considerations" listed in 36 CFR §60.4 apply to it. The criteria considerations, however, must be applied to traditional cultural properties in a manner that is sensitive to the cultural values involved, and that does not reflect ethnocentric bias.

Consideration a: Cemeteries.

Cemeteries are not ordinarily eligible for inclusion in the Register unless they "derive (their) primary significance from graves of persons of transcendent importance, from age, from distinctive design values, or from association with historic events"[10]. Many traditional cultural properties contain cemeteries, however, whose presence contributes to their significance. Tahquitz Canyon in southern California, for example, whose major significance lies in its association with Cahuilla Indian traditional history, contains a number of cemeteries that are the subjects of great concern to the Cahuilla people. The fact that they are present does not render the Canyon ineligible; on the contrary, as reflections of the long historical association between the Cahuilla and the Canyon, the cemeteries reflect and contribute to the Canyon's significance. Thus the fact that a traditional cultural property is or contains a cemetery should not automatically be taken to render it ineligible.

[PHOTO OF CREMATION AT TAHQUITZ? CHECK RON CORBYN & TRIBAL COUNCIL]

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[10] National Register Bulletin 15:54.

Consideration b: Birthplaces and graves.

Birthplaces and graves of famous persons are not usually eligible for inclusion in the Register as such. If the birthplace or gravesite of a historical person is significant for reasons other than its association with that person, however, the property can of course be eligible[11]. Thus in the case of a traditional cultural property, if someone's birth or burial within the property's boundaries was incidental to the larger traditional significance of the property, the fact that it occurred does not make the property ineligible.

On the other hand, it is possible for the birth or burial itself to have been ascribed such cultural importance that its association with the property contributes to its significance. Tahquitz Canyon, for example, is in a sense the traditional "birthplace" of the entire Cahuilla people. Its status as such does not make it ineligible; on the contrary, it is intrinsic to its eligibility. Mt. Tonaachaw in Truk is according to some traditions the birthplace of the culture hero Souwoonilras, whose efforts to organize society among the islands of Truk Lagoon are the stuff of Trukese legend. The association of his birth with the mountain does not make the mountain ineligible; rather, it contributes to its eligibility.

[PHOTO: CHIEF CHARLIE'S GRAVE & SALMON CACHE, ALASKA]

Consideration c: Ownership by a religious institution or use for religious purposes.

A "religious property," according to National Register guidelines, "requires additional justification (for nomination) because of the necessity to avoid any appearance of judgement by government about the merit of any religion or belief"[12]. Conversely, it is necessary to be careful not to allow a similar judgement to serve as the basis for determining a property to be ineligible for inclusion in the Register. Application of this criteria consideration to traditional cultural properties is fraught with the potential for ethnocentrism and discrimination. In many traditional societies, including most American Indian societies, the clear distinction made by Euroamerican society between religion and the rest of culture does not exist. As a result, properties that have traditional cultural significance are regularly discussed by those who value them in terms that have religious connotations. Inyan Karan Mountain, for example, a National Register property in the Black Hills of South Dakota, is significant in part because it is the abode of spirits in the traditions of the Lakota and Cheyenne. Some traditional cultural properties are used for purposes that are definable as religious in Euroamerican terms, and this use is intrinsic to their cultural significance. Kootenai Falls on the Kootenai River in Idaho, part of the National Register-eligible Kootenai Falls Cultural Resource District, has been used for centuries as a vision questing site by the Kootenai tribe. The Helkau Historic District in northern California is a place where traditional religious practitioners go to make medicine and commune with spirits, and Mount Tonaachaw in Truk is an object of spiritual veneration. The fact that such properties have religious connotations does not automatically make them ineligible for inclusion in the Register.

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[11] National Register Bulletin 15:53.

[12] National Register Bulletin 15:46.

[PHOTO: **INYAN KARAN MOUNTAIN**]
[PHOTO: **AMISH OR SHAKER PROPERTY**]

Applying the "religious exclusion" without careful and sympathetic consideration to properties of significance to a traditional cultural group can result in discriminating against the group by effectively denying the legitimacy of its history and culture. The history of a Native American group, as conceived by its indigenous cultural authorities, is likely to reflect a kind of belief in supernatural beings and events that Euroamerican culture categorizes as religious, although the group involved, as is often the case with Native American groups, may not even have word in its language for "religion." To exclude from the National Register a property of cultural and historical importance to such a group, because its significance tends to be expressed in terms that to the Euroamerican observer appear to be "religious" is ethnocentric in the extreme.

In simplest terms, the fact that a property is used for religious purposes by a traditional group, such as seeking supernatural visions, collecting or preparing native medicines, or carrying out ceremonies, or is described by the group in terms that are classified by the outside observer as "religious" should not by itself be taken to make the property ineligible, since these activities may be expressions of traditional cultural beliefs and may be intrinsic to the continuation of traditional cultural practices. Similarly, the fact that the group that owns a property -- for example, an American Indian tribe -- describes it in religious terms, or constitutes a group of traditional religious practitioners, should not automatically be taken to exclude the property from inclusion in the Register. Criteria consideration c was included in the Criteria for Evaluation in order to avoid allowing historical significance to be determined with reference to church doctrine, not in order to exclude arbitrarily any property having religious associations. National Register guidelines stress the fact that properties can be listed in or determined eligible for the Register for their association with religious history, or with persons significant in religion, if such significance has "scholarly, secular recognition"[13]. The integral relationship among traditional Native American culture, history, and religion is widely recognized in secular scholarship[14]. Studies leading to the nomination of traditional cultural properties to the Register should have among their purposes the application of secular scholarship to the association of particular properties with broad patterns of traditional history and culture. The fact that traditional history and culture may be discussed in religious terms does not make it less historical or less significant to culture, nor does it make properties associated with traditional history and culture ineligible for inclusion in the National Register.

Consideration d: Relocated properties.

Properties that have been moved from their historically important locations are not usually eligible for inclusion in the Register, because "the significance of (historic properties) is embodied in their locations and settings as well as in the (properties) themselves" and because "one basic purpose of the National Register is to encourage the preservation of historic properties as living parts of their communities"[15]. This consideration is relevant but rarely applied formally to traditional cultural properties; in most cases the property in question is a site or district which cannot be relocated in any event. Even where the property can be relocated, maintaining it on its original site is often crucial to maintaining its importance in traditional culture, and if it has been moved, most traditional authorities would regard its significance as lost.

Where a property is intrinsically portable, however, moving it does not destroy its significance, provided it remains "located in a historically appropriate setting"[16]. For example, a traditionally important canoe or other watercraft would continue to be eligible as long as it remained in the water or in an appropriate dry land context (e.g. a boathouse). A property may also retain its significance if it has been moved historically[17]. For example, totem poles moved from one Northwest Coast village to another in early times by those who made or used them would not have lost their significance by virtue of the move. In some cases, actual or putative relocation even contributes to the significance of a property. The topmost peak of Mt. Tonaachaw in Truk, for example, is traditionally thought to have been brought from another island; the stories surrounding this magical relocation are parts of the mountain's cultural significance.

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[13] National Register Bulletin 15:46--48.

[14] For example see U.S. Commission on Civil Rights 1983; Michaelson 1985; Walker 19__).

[15] National Register Bulletin 15:49

[16] National Register Bulletin 15:52.

In some cases it may be possible to relocate a traditionally significant property and still retain its significance, provided the property's "historic and present orientation, immediate setting, and general environment" are carefully considered in planning and executing the move[18]. At Lake Sonoma in California, for example, the U.S. Army Corps of Engineers relocated a number of boulders containing petroglyphs having artistic, archeological, and traditional cultural significance to protect them from inundation. The work was done in consultation with members of the local Pomo Indian tribe, and apparently did not destroy the significance of the boulders in the eyes of the tribe[19].

[PHOTO: SAILING CANOE AT SEA?]

[PHOTO: RELOCATED PETROGLYPHS AT LAKE SONOMA?

Consideration a: Commemoration.

Like other properties, those constructed to commemorate a traditional event or person cannot be found eligible for inclusion in the Register based on association with that event or person alone[20]. The mere fact that commemoration is involved in the use or design of a property should not be taken to make the property ineligible, however. For example, traditional meetinghouses in the Republic of Palau, included in the National Register, are typically ornamented with "storyboards" commemorating traditional events; these derive their design from traditional Palauan aesthetic values, and thus contribute to the cultural significance of the structures. They connect the structures with the traditional history of the islands, and in no way diminish their cultural, ethnographic, and architectural significance.

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[17] National Register Bulletin 15:51.

[18] National Register Bulletin 15:50.

[19] The location to which a property is relocated, and the extent to which it retains its integrity after relocation, must be carefully considered in judging its continued eligibility for inclusion in the National Register. See National Register Bulletin 15, pp. 49-52, for general guidelines.

[20] National Register Bulletin 15:61.

[PHOTO: BAI RA AIRAI, PALAU]

Consideration f: Significance achieved within the past 50 years.

Properties that have achieved significance only within the 50 years preceding their evaluation are not eligible for inclusion in the Register unless "sufficient historical perspective exists to determine that the property is exceptionally important and will continue to retain that distinction in the future"[21]. This is an extremely important criteria consideration with respect to traditional cultural values. A significance ascribed to a property only in the last 50 years cannot be considered traditional.

As an example, consider a mountain peak used by an Indian tribe for communication with the supernatural. If the peak has been used by members of the tribe for many years, or if it was used by members of the tribe in prehistory or early history, it may be eligible, but if its use has begun only within the last 50 years, it is probably not eligible.

The fact that a property may have gone unused for a lengthy period of time, with use beginning again only recently, does not make the property ineligible for the Register. For example, assume that the Indian tribe referred to above used the mountain peak in prehistory for communication with the supernatural, but was forced to abandon such use when it was confined to a distant reservation, or when its members were converted to Christianity. Assume further that a revitalization of traditional religion has begun in the last decade, and as a result the peak is again being used for vision quests similar to those carried out there in prehistory. The fact that the contemporary use of the peak has little continuous time depth does not make the peak ineligible; the peak's association with the traditional activity, which may or may not be reflected in its contemporary use, is what must be considered in determining eligibility.

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[21] National Register Bulletin 15:62.

[PHOTO TO ILLUSTRATE ABOVE POINT?]

The length of time a property has been used for some kinds of traditional purposes may be difficult to establish objectively. Many cultural uses may have left little or no archeological evidence, and may not have been noted by ethnographers or early visitors to the area. Some such uses are explicitly kept from outsiders by members of the group ascribing significance to the property. Indirect evidence and inference must be weighed carefully, by or in consultation with trained ethnographers, ethnohistorians, and other specialists, and professional judgements made that represent one's best, good-faith interpretation of the available data.

Consideration g: Reconstruction.

A reconstructed property -- that is, a new construction that ostensibly reproduces the exact form and detail of a property or portion of a property that has vanished, as it appeared at a specific period in time -- is not normally eligible for inclusion in the Register unless it meets strict criteria[22]. The fact that some reconstruction has occurred within the boundaries of a traditional cultural property, however, does not justify regarding the property as ineligible for inclusion in the Register. For example, individuals involved in the revitalization of traditional Hawaiian culture and religion have reconstructed certain religious structures on the island of Kaho'olawe, but this in no way diminishes the island's significance or its eligibility for inclusion in the Register.

Describing a Traditional Cultural Property

Describing a traditional cultural property, on a National Register nomination form or in eligibility documentation, can present special challenges. First, those who ascribe significance to the property may be reluctant to allow its description to be committed to paper, or to be filed with a public agency that might release information about it to inappropriate people. Second, the description necessarily involves addressing both the physical characteristics of the property and its intangible cultural aspects. Third, boundaries are often difficult to define. Fourth, in part because of the difficulty involved in defining boundaries, it is important to address the setting of the property.

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[22] National Register Bulletin 15:57-60.

The problem of confidentiality

Particularly where a property has supernatural connotations in the minds of those who ascribe significance to it, or where it is used in ongoing cultural activities that are not readily shared with outsiders, it may be strongly desired that both the nature and the precise location of the property be kept secret. Such a desire on the part of those who value a property should of course be respected, but it presents considerable problems for the use of National Register data in planning. In simplest terms, one cannot protect a property if one does not know that it is there.

The need to reveal information about something that one's cultural system demands be kept secret can present agonizing problems for traditional groups and individuals. It is one reason that information on traditional cultural properties is not readily shared with Federal agencies and others during the planning and environmental review of construction and land use projects. However concerned one may be about the impacts of such a project on a traditional cultural property, it may be extremely difficult to express these concerns to an outsider if one's cultural system provides no acceptable mechanism for doing so. These difficulties are sometimes hard for outsiders to understand, but they should not be underrated. In some cultures it is sincerely believed that sharing information inappropriately with outsiders will lead to death or severe injury to one's family or group.

As noted above, information on historic properties, including traditional cultural properties, may be kept confidential under the authority of §304 of the National Historic Preservation Act[23]. This may not always be enough to satisfy the concerns of those who value, but fear the results of releasing information on, traditional cultural properties. In some cases these concerns may make it necessary not to nominate such properties formally at all, or not to seek formal determinations of eligibility, but simply to maintain some kind of minimal data in planning files. For example, in planning deployment of the MX missile system in Wyoming, the Air Force became aware that the Lakota Indian tribe in the area had concerns about the project's impacts on traditional cultural properties, but was unwilling to identify and document the precise locations and significance of such properties. To resolve this problem, Air Force representatives met with the tribe's traditional cultural authorities and indicated where they wanted to construct the various facilities required by the deployment; the tribe's authorities indicated which of these locations were likely to present problems, without saying what the nature of the problems might be. The Air Force then designed the project to minimize use of such areas. In a narrow sense, obviously, the Air Force did not go through the process of evaluation recommended by this Bulletin; no specific properties were identified or evaluated to determine their eligibility for inclusion in the National Register. In a broader sense, however, the Air Force's approach represents excellent practice in the identification and treatment of traditional cultural properties. The Air Force consulted carefully and respectfully with those who ascribed traditional cultural significance to properties in the area, and sought to accommodate their concerns. The tribe responded favorably to this approach, and did not take undue advantage of it. Presumably, had the tribe expressed concern about such expansive or strategically located areas as to suggest that it was more interested in impeding the deployment than in protecting its valued properties, the Air Force would have had to use a different approach.

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[23] For details regarding maintaining confidentiality, see National Register Bulletin 29, *Guidelines for Restricted Location Information*.

In summary: the need that often exists to keep the location and nature of a traditional cultural property secret can present intractable problems. These must be recognized and dealt with flexibly, with an understanding of the fact that the management problems they may present to Federal agencies or State Historic Preservation Officers may pale into insignificance when compared with the wrenching cultural conflicts they may present to those who value the properties.

Tangibles and intangibles

The description of a traditional cultural property should present not only its contemporary physical appearance and, if known, its historical appearance, but also the way it figures in the relevant traditional belief or practice. For example, one of the important cultural locations on Mt. Tonaachaw in Truk is an area called *Neepisaram,* which physically looks like nothing but a grassy slope near the top of the mountain. In tradition, however, it is seen as the ear of *kuus,* a metaphorical octopus identified with the mountain, and as the home of *Saraw,* a warrior spirit/barracuda. Obviously a description of *Neepisaram* would be incomplete and largely irrelevant to its significance if it identified it only as a grassy slope near the top of the mountain.

Period of significance

Describing the period of significance for a traditional cultural property can be an intellectual challenge, particularly where the traditions of a Native American or Micronesian group are involved. In such cases there are often two different kinds of "periods." One of these is the period in which, in tradition, the property gained its significance -- the period during which the Cahuilla people emerged from the lower world through Tahquitz Canyon, or the period when civilization came to Truk through the magical arrival of the culture-bearer Sowukachaw on Mt. Tonaachaw. Such periods often have no fixed referent in time as it is ordinarily construed by Euroamerican scholarship[24]. To the Cahuilla, their ancestors simply emerged from the lower world at the beginning of human life on earth, whenever that may have been. A Trukese traditional authority will typically say simply that Sowukachaw came to Truk *"neemw neemw neemw"* (long, long ago). It is usually fruitless, and of little or no relevance to the eligibility of the property involved for inclusion in the National Register, to try to relate this sort of traditional time to time as measured by Euroamerican history. Traditional "periods" should be defined in their own terms. If a traditional group says a property was created at the dawn of time, this should be reported in the nomination or eligibility documentation; for purposes of National Register eligibility there is no need to try to establish whether, according to Euroamerican scholarship or radiocarbon age determination, it really *was* created at the dawn of time.

The second period that is often relevant to a traditional property is its period of use for traditional purposes. Although direct, physical evidence for such use at particular periods in the past may be rare in the case of properties used by Native American groups, it is usually possible to fix a period of use, at least in part, in ordinary chronological time. Establishing the period of use often involves the weighing of indirect evidence and inference. Interviews with traditional cultural authorities are usually the main sources of data, sometimes supplemented by the study of historical accounts or by archeological investigations. Based on such sources of data it should be possible at least to reach supportable inferences about whether generations before the present one have used a property for traditional purposes, suggesting that it was used for such purposes over fifty years ago. It is seldom possible to determine when the traditional use of a

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[24] Except, perhaps, by some of the more esoteric subfields of cosmology and quantum mechanics.

RECOMMENDED BIBLIOGRAPHY AND SOURCES

National Register Bulletins: 15, 16, 29.

Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation.
ACHP/DOI Identification Guidelines

Cultural Conservation
Handbooks on oral history, folklife, ethnography
Examples -- Theodoratus, Bean, Stoffle; Grouse Creek; etc.

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Nevada Mining Association
Northwest Mining Association
Rocky Mountain Oil & Gas Association
Utah Mining Association
Utah Petroleum Association
Western Forest Industries Association
Western States Public Lands Coalition
Wyoming Mining Association

ON S.1124

Before Senate Select Committee on Indian Affairs of the
United States Senate
September 28, 1989

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INTRODUCTION

Mr. Chairman, and members of the Committee, I am Scott Matheson, of the law firm of Parsons, Behle & Latimer. I am appearing today on behalf of various associations representing mining, timber, oil and gas interests. We appreciate this opportunity to present our views on S.1124.

Last year, I had the opportunity to testify before this Committee concerning a similar proposal to amend the American Indian Religious Freedom Act. Following press reports of that testimony, several of my friends in Utah, both Indian and non-Indian, expressed concern that my statement may have appeared to reflect a lack of sensitivity toward Indian religions. Certainly, I do not believe that is true, though from the brief excerpts of my testimony that were reported, I can understand how that mistaken impression was given. Accordingly, before I address the merits of S.1124, I want to make it clear that my comments today are not meant to suggest any disrespect for the religious beliefs or practices of any Americans Indian groups. If any portion of my testimony gives that impression, it comes from my inability to properly express my concerns with the legislation and not from any insensitivity toward American Indian religious beliefs or practices. I fully and sincerely believe that American Indian religions deserve equal protection under the Free Exercise Clause of the Constitution. Unfortunately, I am here today because I believe that S.1124 offers more than equal treatment. In addition, I want to stress that the focus of my testimony is not on American Indian religion. I am not an expert on American Indian religions and do not appear as one. I do, however, have a great deal of experience and knowledge about the management and use of public lands in the West, and S.1124 has important implications for the future use of public resources. The purpose of my testimony here is to explain what some of those implications are.

While the goal of protecting American Indian religious freedoms is laudable, the approach of S.1124 goes too far, and rather than imposing a standard of equality, singles out certain beliefs for preferential treatment, in clear violation of the Establishment Clause of the First Amendment. In addition, there are significant practical problems created by S.1124. The broad language of the bill will disrupt existing federal land use planning practices and will place an impossible burden on federal land management agencies and the courts to inspect, measure and weigh Indian religious interests. Federal Courts will be equally disrupted as S.1124 will spawn endless litigation. Finally, S.1124 will have a harmful, disruptive impact on the use of federal lands for all other public uses, including mining, water, timber and recreation.

Given this sweeping impact and unconstitutional character of the bill, S.1124 should not be precipitously enacted into law. Indeed, in its present form it should not become law. As it now stands, S.1124 grants absolute priority to the interests of one group over the interests over all other Americans with regard to public lands. Such is not a proper principle on which to manage federal lands. Instead, the principles of multiple use, accommodation of interests, and cooperation between parties should be the basis of the government's management of public land. Finally, S.1124 is unnecessary. Existing statutes and regulations presently in effect provide protection for Native American religions, and allow Native Americans to participate effectively in the management of federal lands.

I. THE LEGAL EFFECT OF S.1124 WILL BE TO GIVE CERTAIN NATIVE AMERICANS A VETO OVER USE OF FEDERAL LANDS.

The legal effect of S.1124 will be to give certain Native Americans, as individuals or groups, an effective veto power over both the government's management of its property and the public's right to use public land. This is so because the statutory preference for traditional Native American religious interests will, in practice, be absolute given the language of the bill. Accordingly, all other interests and activities on public lands will be made subordinate and inferior to the religious interests of just one group of Americans.

Effective Veto. S.1124 applies to all federal land which has "historically been considered sacred and indispensable" and is "necessary to the conduct of" a Native American Indian religion. As to all such federal land, no use will be permitted if it will "pose a substantial and realistic threat of undermining and frustrating such religion or religious practice." This language would require governmental agencies responsible for managing federal lands to prohibit any activity -- whether it be recreation, resource development, or even religious activity of a non-traditional type -- if it would merely "pose" a threat to traditional Indian religious practices. As such, this provision would place a veto power in the hands of an unknown number of Native American individuals or groups over all federal land decisions because only such persons will be in a position to decide (1) what their traditional religious practices are, (2) where their religious practices take place, (3) what lands are necessary to the conduct of their religion and (4) what other activities on federal land "pose a substantial and realistic threat" to their practices.

Indian religions and religious practices are for the most part undocumented and unwritten. They are often considered secret by their adherants. Native Americans historically practiced their religions in a vast number of unrecorded locations throughout the United States, which are known today, if at all, only through oral traditions. Consequently, traditional Indian religious practices, especially as they relate to the land, are not readily subject to objective examination, factual scrutiny, or even clear description. For example, in United States v. Means, 627 F. Supp. 247 (S.D. 1985), while the court accepted the claim that the Black Hills of South Dakota was a traditional religious area for the Lakota Nation, there was no clear factual evidence of the precise history or extent of tribal use of the area. Acknowledging the lack of evidence, the judge speculated that the Black Hills might have been used by the tribe "for 117 years" or "217 or 417 years." Id. at 253. Similarly, the size of the area of religious significance was also unclear. In fact, the specific 800-acre area claimed by the Indian plaintiffs in that case "did not have specific religious significance prior to the time it was chosen" by them for religious use in 1981. Id. Nevertheless, they claimed that their use of the area was indispensable to their traditional religious practice. Id. In sum, because of the limited factual evidence on historical Indian religious practices on the land, S.1124 would compel governmental agencies and courts would to rely on, and thus wholly defer to, Indians' own claims about the character and location of their traditional religious practices.

Similarly, there is no objective or impartial way to determine when activities of others on federal land would "pose a substantial and realistic threat" to traditional Indian religious practices. Only the Indians asserting a traditional religious practice would be in a position to say whether and to what extent other activities posed a threat to their practice. This would leave governmental agencies and courts in an impossible situation. As the United States Supreme Court recently pointed out, any rule prohibiting substantial interference with Indian religious practices on federal land would result either in the government having uncritically to accept the Indians' own assertions about their religion (and what would interfere with it), or in the government improperly intruding itself into Indians' religious beliefs and practices in order to determine when they are truly threatened by other activity. The former approach would make the "substantial and realistic threat" standard effectively meaningless, and the latter would lead to improper governmental entanglement with religion. *Lyng v. Northwest Indian Cemetary Protective Association,* 485 U.S.__, 99 L.Ed. 2d 534, 552 (1988). In sum, because only Native Americans can say what their traditional practices are, where they take place and when they are threatened, S.1124 would hand over to an unknown number of Native American Groups and individuals controlling power of federal land use decisions.[1]

Unqualified Veto. S.1124 attempts to limit this veto power where a federal agency can demonstrate that the its management decision is necessary to (a) carry out the legal responsibilities of the government, (b) protect a compelling governmental interest, or (c) protect a vested property right. These limitations are without substance and necessarily ineffective. As to the first, it is self evident that the only way the government may act is pursuant to its legal responsibilities. It is, by its very nature, a creature of the law. Hence, either all governmental actions are condoned by the bill, or -- more likely -- courts will find this limitation to be restricted by the second, and no activities will be permissible without a "compelling governmental interest." In short, the first limitation on the Indian veto power which the bill creates is meaningless.

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[1] The "G-0 Road" case illustrates the consequences of allowing just one group of Americans decide when their religion is threatened by other uses of public land. The Forest Service attempted to pave a six-mile section of an existing road through a national forest. Indian tribes objected, arguing that an entire twenty-five square mile area was sacred country, which had to be maintained in a completely pristine, natural state for the practice of their religion. The Forest Service attempted to accommodate the Indians' religions concerns by relocating the proposed road as far as possible from where the Indians actually carried out their religious practices. In addition, the Forest Service offered to set aside 500 acres, free from development, around each of the eleven sacred sites identified by the Indians. The Indians rejected this offer, demanding that the entire twenty-five square miles be kept totally free from proposed activity because the mere sight and sound of the distant road threatened their religious activities which required, they argued, complete privacy, silence, and isolation to be effective. *Lyng*, 99 L.Ed. 2d at 542. 549-550. Had S. 1124 been the law at the time of the G-0 Road case, the Indian plaintiffs would have been able to gain control of twenty-five square miles of public land for their exclusive use.

The "compelling governmental interest" limitation is also ineffective because the standard cannot, in practice, ever be met with regard to the use of federal land. The compelling federal interest language is taken from Supreme Court cases in which the Court imposes the heaviest, most difficult-to-meet burden on the government to justify its conduct. To satisfy the standard, the government must show both that its conduct concerns "interests of the highest order" and that there exists no alternative means by which its interests can be served. Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972); Sherbert v. Verner, 374 U.S. 398, 407 (1963). This standard is rarely used by the courts because, except in the rarest circumstances, no government activity, and certainly no private activity merely permitted or approved by the government, can satisfy this standard. Because non-Indian uses of federal land will never be able to satisfy the "compelling governmental interest" standard, the Native American veto over all federal land use decisions created by S.1124 will be absolute.

The third limitation--protection of vested property rights--provides only a limited protection to just a few persons because the vast majority of Americans have no vested property rights in federal land. They would lose their current rights to use public lands under multiple use principles.

In sum, S.1124 would deprive the government and the public at large from controlling and using the public lands for the benefit of all Americans because it would grant to just one group of Americans the effective power to make decisions over federal lands.

II. S.1124 VIOLATES THE ESTABLISHMENT CLAUSE BY GIVING PREFERENTIAL TREATMENT TO ONE TYPE OF RELIGION.

A. S.1124 Violates the Core of the Establishment Clause by Providing Official Governmental Preferential Treatment of One Type of Religion.

The Establishment Clause prohibits the government from giving special status or preferential treatment to any particular religion. This prohibition is absolute. The Supreme Court has clearly and repeatedly stated that no state can "pass laws which aid one religion" or that "prefer one religion over another." *Everson v. Board of Education*, 330 U.S. 1, 15 (1947). This prohibition is the essence of the Establishment Clause and cannot be violated.

S.1124[2] clearly provides special status and preferential treatment for traditional Native American religions in the management of federal lands. The bill's stated purpose is to protect traditional Native American religious practices. The bill specifically restricts its benefits to a particular category of religion -- traditional Native American religions. The bill grants special power and official governmental status to Native American religions by mandating that federal agencies manage all federal land in a manner which gives an absolute priority to the interests of these religions and only these religions. Not only are other religions not given such official recognition by the bill, they are also disadvantaged with respect to access to and use of federal land because their interests are made subordinate to those of traditional Indian religions. There could be no greater or more blatant violation of the core of the Establishment Clause than S.1124.

In enforcing the Constitutional prohibition against the establishment of religion, the Supreme Court has repeatedly struck down laws which prefer a single religion or which even attempt to discriminate between religions. In Larson v. Valente, 456 U.S. 228 (1982), the Court struck down a Minnesota statute which discriminated much less blatantly than S.1124. The Minnesota statute simply required church denominations which received less than 50% of their total contributions from church members to comply with certain registration and reporting requirements. The Court found the statute discriminatory, and therefore, unconstitutional. In *Larson*, Justice Brennen stated:

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[2] **The bill presented by Rep. Udall in the House of Representatives, H.R.1546, is constitutionally defective for the same reasons as S.1124 making separate discussion of that bill unnecessary.**

> The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another. Before the Revolution, religious establishments of differing denominations were common throughout the colonies. But the Revolutionary generation emphatically disclaimed that European legacy, and "applied the logic of secular liberty to the condition of liberty and the churches.". . .*[T]his court has adhered to the principal, clearly manifested in the history and logic of the Establishment Clause, that no State can "pass laws which aid one religion" or that "prefer one religion over another."*

Id. at 244-46 (emphasis added). The Constitutional prohibition against governmental recognition of or favoritism toward any particular religion is *absolute*.[3]

The Constitution's absolute prohibition of preferential treatment of one religion over another clearly applies to the federal government's management of public lands, even when traditional Indian religious practices are involved. The Tenth Circuit declared that the Establishment Clause prohibits the government from restricting others' use of federal land for the

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[3] *Epperson v. Arkansas*, 393 U.S. 97, 104, 106 (1968)("The First Amendment mandates governmental neutrality between religion and religion . . . . *The State may not adopt programs or practices . . . which 'aid or oppose' any religion*, . . . This prohibition is absolute.") (emphasis added); *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963)("The fullest realization of true religious liberty requires that *government . . .effect no favoritism among sects*") (emphasis added);

"purpose of aiding [Native American] conduct of religious ceremonies." Badoni v. Higginson, 638 F.2d 172, 179 (10th Cir. 1980).[4] Justice Brennan recently warned against the government giving this kind of religious preference in the use of public land: "Should [American Indians] or any other group seek to force the Government to protect their religious practices from the interference of private parties, such a demand would implicate . . . the concerns . . . of the Establishment Clause." Lyng, 99 L.Ed.2d at 564 (Brennan, J., dissenting).

The Congressional Research Service ("CRS") also recognizes that S.1124 violates the Establishment Clause's absolute prohibition against discriminating among religions:

> A further problem arises because of the fact that the legislation [S.1124] singles out one type of religion, Native American religion, or historically based Native American religion, for special treatment to the exclusion of all other types of religion. While it is true that the Native American religion is site - specific and has traditionally involved rituals tied to natural phenomenon, Native American religion is not alone in this phenomenon. Even traditional Christian religions at times embrace religious practices that require certain landscapes, e.g., three of the world's traditional religions have differed for almost five centuries over the treatment of various sites in Jerusalem.

Memorandum to the House Committee of Interior and Insular Affairs, Congressional Research Service, CRS-10, June 30, 1989

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[4] See also Inupiat Community of Arctic Slope v. United States, 548 F.Supp. 182, 189 (D. Alaska 1982), aff'd, 746 F.2d 570 (9th Cir. 1984) ("the First Amendment may not be asserted to deprive the public of its normal use of an area").

("CRS Report"). Given the direct manner in which S.1124 violates the absolute prohibition against governmental preferences for specific religions, which is at the core of the Establishment Clause, the bill is clearly unconstitutional and should not become law.

B. Congress' Constitutional Power to Permit Indian Tribes to Govern their Own Affairs Does Not Make S.1124 Constitutional.

The CRS Report suggests that perhaps S.1124 can avoid being held unconstitutional by the invocation of Supreme Court decisions recognizing the rights of Indian tribes to govern their own affairs. This argument necessarily fails because S.1124 has nothing to do with tribal self-government. Moreover, the principle of tribal self-government does not permit the government to violate the Establishment Clause. S.1124 does not concern the rights of Indians to rule over Indian lands and property. Rather, S.1124 gives adherants to particular Indian religions the power to govern the lives of other Americans with respect to federal land. Federal land is held in trust by the United States Government for all Americans. S.1124 effectively delegates to certain religious groups management over one of Americans' most valued treasures -- public land. In short, S.1124 violates the Establishment Clause by giving official preference to one type of religion and by allowing certain religious groups effective power over all other Americans with respect to public lands; no principle of tribal self-government permits such results.

The Supreme Court decisions cited by the CRS Report clearly concern the right of organizations to govern themselves and to control their operations or own property. They do not concern nor legitimate any violation of the Establishment Clause. Neither do they support any delegation of governmental authority to religious groups to make decisions concerning public land affecting other Americans. In Corp. of Presiding Bishop v. Amos, ___ U.S.____, 107 S.Ct. 2862 (1987), the Supreme Court merely upheld a church's right to apply a religious standard in hiring employees to work in church operations. Similarly, in Morton v. Mancarri, 417 U.S. 535 (1974), the Supreme Court upheld the power of Congress to give the Bureau of Indian Affairs the right to discriminate in favor of Indians in making its employment decisions. The Court expressly based this power on the specific purpose of facilitating Indian self government and control over Indian property and lands. The Court specifically noted that the preference in Morton was limited in this matter and that it did not apply to "any other government agency or activity . . ." Morton 417 U.S. at 554.[5] Thus, it is clear that neither Amos nor Morton provide any support for the religious preference in the use of the federal land created by S.1124.

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[5] The CRS's reference to Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977), is misplaced. That case involved a dispute between Indians, where Indians were not given any preference vis-a-vis non-Indians. Thus, Weeks provides no support for S.1124 and does not allow the bill to avoid the consequences of its unconstitutional preference for one type of religion.

In stark contrast to the Supreme Court's tolerance of churches and tribes giving preference to their own members in matters related to self government, the Supreme Court has never authorized congressional delegation of power over all Americans to such groups. In Larkin v. Grendel's Den, 459 U.S. 116 (1982), the Supreme Court vehemently denounced such delegation. The delegation of governmental power that was at issue in Larkin is almost identical to the delegation which S.1124 would grant Indian religious groups. In Larkin, a Massachusetts statute gave churches and schools within 500 yards of any business applying for a liquor license the power to veto government decisions to grant such license. The Supreme Court had no trouble finding the statute unconstitutional and struck it down. It follows that S.1124, in addition to unconstitutionally giving preferential treatment to one type of religion, also unconstitutionally delegates governmental authority to Native American religious groups over the rights of other Americans with respect to use of public land.

C. S.1124 Violates the Establishment Clause, Even When Judged Under the "Lemon Test" Designed to Evaluate Governmental Actions Which Do Not Discriminate In Favor of One Religion.

S.1124 is unconstitutional because it discriminates in favor of one type of religion. However, even if S.1124 were somehow nondiscriminatory as between religions, it would still violate the Establishment Clause. In order to be constitutional, a nondiscriminatory statute must satisfy all three steps of the "Lemon test." To be constitutional, a statute first must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; third, the statute must not foster excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). S.1124 fails to satisfy any of these requirements, and is therefore clearly unconstitutional.

1. S.1124 does not have a secular legislative purpose.

S.1124 expressly gives Native Americans preferential treatment in the use of federal land for the benefit of their traditional religions. Indeed, the bill's stated purpose is "[t]o provide a means to ensure that the management of Federal lands does not undermine and frustrate traditional Native American religious practices." Thus, it is beyond dispute that S.1124 has no secular purpose whatsoever, but solely a religious one.

Under the first step of the Lemon test, the Supreme Court routinely strikes down laws with far greater claims to having secular purposes than does S.1124. In Edwards v. Aquillard, 482 U.S. 578 (1987), the Court struck down a Louisiana statute which merely required the State's public schools to give balanced treatment to "creation science" and "evolution science."[6] The statute had a religious purpose, the Supreme Court determined. Similarly, the Court also found an unconstitutional purpose in an Arkansas statute providing school children with a one-minute moment of silence for meditation. Wallace v. Jaffree, 472 U.S. 38 (1985).

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[6] Accord Epperson v. Arkansas, 393 U.S. 97 (1968)(Arkansas statute prohibiting the teaching of the theory of evolution violates the Establishment Clause of the First Amendment because it has an unconstitutional religious purpose).

Congress cannot repair S.1124's constitutional deficiency by fabricating a secular purpose for the bill. The CRS Report suggests such a "fig leaf" solution to the bill's unconstitutional religious purpose. Not only would such a solution be transparently disingenuous, it would also fail as a practical matter because it would not fool the courts. The courts routinely look past stated purposes of statutes to their legislative histories to determine their real purposes. In Edward v. Aquillard, the Supreme Court rejected the statute's stated purpose of "academic freedom" and found the real purpose -- promotion of a particular religious theory -- in violation of the Constitution. 482 U.S. at 586-94. Decrying the legislature's attempt to avoid the Establishment Clause by fabricating a secular purpose, Justice Brennan stated that "[w]hile the Court is normally differential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." Id at 586.[7] Hence, any subsequent revision of S.1124 will similarly be haunted by the ghost of the unconstitutional purpose found in the present version of the bill.

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[7] Accord Epperson v. Arkansas, 393 U.S. at 107-8 (statute unconstitutional under the first step of the Lemon test because its antecedent statute contained a facially unconstitutional purpose); Wallace v. Jaffree, 472 U.S. 38 (1985) (Court rejected stated purpose of providing a one minute for meditation and found that the statute had an unconstitutional purpose).

2. S.1124 Impermissibly Advances Religion by Dedicating Public Land for Religious Purposes.

S.1124 fails the second step of the Lemon test because the effect of the bill is to advance religion. The bill advances religion by making traditional Indian religious use of federal land a favored, priority use, preempting all conflicting alternative uses. Larkin v. Grendel's Den, 459 U.S. 116 (1982), clearly illustrates the Constitutional deficiencies of S.1124 under the second step of the Lemon test. Similar to this bill, the Massachusetts statute in Larkin effectively granted churches and schools veto power over liquor license applications from any business within 500 feet of the church or school. Finding that the statute obviously advanced religious interests, the Supreme Court briefly discussed the meaning of the Establishment Clause generally, and then dismissed the statute as unconstitutional in two short paragraphs. S.1124 would likely receive similar treatment at the hands of the Supreme Court.

Furthermore, the Supreme Court precedents unequivocally establish that any dedication of public facilities or property for religious purposes, in any form, violate the "advancing religion" step of the Lemon test. In McCollum v. Board of Education, 333 U.S. 203 (1948), the Court struck down an Illinois Board of Education practice of permitting students to attend religious instruction classes in school buildings. In Tilton v. Richards, 403 U.S. 672 (1971), the Court found Congressional aid to parochial colleges and universities to unconstitutionally advance religion simply because the provisions limiting the facilities to secular purposes expired after twenty years, thereby allowing use of the facilities for sectarian purposes after such period. Id. at 683. Finally, the Court found that a New York statute impermissibly advanced religion by providing funds for the repair and maintenance of non-public schools -- primarily religious ones -- without restricting payments to the upkeep of facilities used for secular purposes. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973). In all these cases, the danger that religion would be advanced by the government program was far less severe than is present in S.1124.

S.1124 runs directly contrary to the Supreme Court's mandate by requiring that federal lands be managed in a manner which will favor and give priority to religious beliefs and practices (of just one type of religion) over all other activities. By doing so, S.1124 effectively dedicates federal land to the religious purposes of Native American religions. Surely if the failure to limit repair and maintenance funds to secular purposes advances religion under the Lemon test, S.1124, which mandates that federal land be dedicated to Indian religious purposes over all others, does so also.

The CRS Report perfunctorily suggests that Corp. of Presiding Bishop v. Amos can be invoked to justify S.1124 as merely "allowing" religious practices to occur without interference under the guise of removing federal impediments. Amos provides no support for the advancement of religion contemplated in S.1124. Amos simply held that a church had the right to hire church members to work in its own facilities on the basis of their standing in the church. Amos concerns only the freedom of a church to control its own internal affairs on its own property. Amos has no application to a statute mandating that public lands be used so as to facilitate the religious practices of a particular type of religion.

In short, S.1124, by its actual language as well as its legislative history, clearly has the effect of advancing religion and is therefore unconstitutional.

3 S.1124 clearly creates excessive governmental entanglement with religion by delegating governmental power to religious groups, and by increasing administrative oversight of religion.

S.1124's final Constitutional defect, under the Lemon test, is the excessive government-religion entanglement which the bill will produce. In the Larkin case noted above, the Supreme Court found that the veto power given to churches was an impermissible delegation of governmental power to religious groups, and therefore "inescapably implicate[d] the Establishment Clause." 459 U.S. at 305. The effective veto power which S.1124 grants to Indian religious groups delegates governmental power to religious groups in the same way as the Massachusetts statute in Larkin, and therefore "inescapably implicates the Establishment Clause".

In Lemon v. Kurtzman, the Supreme Court found that proposed public aid to religious schools would result in excessive governmental entanglement with religion because the inspection of parochial schools by state administrators, which would be necessary to monitor the aid program, would itself create the very entanglement the Constitution prohibits. Lemon, 403 U.S. at 622-23. S.1124 is replete with directives to governmental agencies which will increase administrative entanglement with Native American religions. All federal agencies managing government lands will be required to make determinations concerning the traditional and present day practices of Indian religions. Similarly, the religious status of numerous locations on federal land will have to be determined with respect to Native American religions.

Federal agencies will be further entangled with Native American religions as they attempt to meet the bill's requirements that they "accommodate the various competing interests" and attempt to act in a manner which is the least intrusive on Indian religions. Indeed, the bill's very attempts to prevent too broad an application--the requirement that land has been "historically considered sacred and indispensable" and "necessary to . . . religious practice" in order to be protected and the prohibition only of activities which "will pose a substantial and realistic threat of undermining and frustrating" to traditional Indian religions--guarantee that excessive entanglement with religion will occur. Indeed, entanglement must occur if the bill is to be applied.

The CRS Report also recognizes the unconstitutional entanglement problems S.1124 presents.

> On the issue of undue government involvement in religion, the AIRFA amendments may confront a cumbersome obstacle. Each of the bills [H.R. 1546 and S.1124] includes some manner of assuring that the religious practice has historical ties to the land, is a substantial one, or that the governmental activity would seriously affect the Native American religious practice. Each of these qualifiers invites governmental administrative bodies or courts to evaluate religious practices and their influence and importance to the adherents of the groups[.]

Memorandum; at CRS-10.

In sum, S.1124 not only blatantly violates the core of the Establishment Clause which absolutely prohibits discriminatory treatment of particular religions, it also fails the more lenient Lemon test applied to nondiscriminatory governmental actions affecting religion.

III. S.1124 WILL HAVE AN ENORMOUS AND DISRUPTIVE IMPACT ON PUBLIC LANDS THROUGHOUT THE COUNTRY.

S.1124 will have an enormous, disruptive impact on virtually all federal lands. This is true for at least two reasons. First, Native Americans' aboriginal lands once encompassed all of what is now the United States. Literally tens of thousands of sites and areas have been used for traditional religious purposes by American Indians. Consequently, there are thousands of sacred Indian religious locations throughout the country. Second, the language of the bill is so broad and sweeping that there is no area of federal land that will not be subject to the Native American veto power the bills create. S.1124 applies to any federal land as long as it once was historically considered "sacred and indispensable" to an Indian religion and is deemed "necessary" to a religious practice. The language of the bill thus ensures that all federal lands, of every type and in every region, will be governed by the statutory preference for traditional Indian religious use.

Many valuable resources and assets, especially in the West, will be detrimentally affected by the Indian veto power the bills create. The federal government owns 732 million acres of land, over 566 million of which are located in Alaska, Arizona, California, Hawaii, Idaho, Oregon, and Washington. Bureau of Land Management, Public Land Statistics 10 (1984). Federal land constitutes a majority, often an overwhelming amount, of the land area of many western states. Additionally, much of the country's natural resources are located on federal land. For example, federal lands contain 85% of the nation's crude oil, 40% of the natural gas, 40% of the uranium, 35% of the coal reserves (60% in the West), and 50% of the standing softwood timber. U.S. Dept. of Energy, Securing America's Future Energy National Energy Policy Plan at 1 (1981); Council on Environmental Quality, Environmental Quality at 351 (1986).

Thus, it is obvious that S.1124, by creating a Native American veto over federal land use decisions, will greatly affect all the western states, and most certainly severely interfere with the orderly use and development of the country's natural resources. For these reasons alone, S.1124 should not be enacted into law. Instead, they should be considered carefully on the basis of thoroughly developed information and substantial public involvement.

S.1124 will not only disrupt and likely harm the management of public land, the bill will also create a new form of private property in federal land available only to Native Americans. The bill would create a Native American religious property right to federal lands by granting to Indians not only the right to use public land for their religious purposes, but also the right to exclude all other uses and users whenever they are deemed a "threat" to Indian religious interests. In Lyng, the United States Supreme Court pointed out that the Indians' religious claim to twenty-five square miles of a national forest was, in fact, a claim for an exclusive "de facto beneficial ownership" of public land. Lyng 99 L.Ed.2d at 549.

Neither religious freedom nor the First Amendment entitles any one category of Americans to a private property right to public land. Yet S.1124 would do exactly that. All other Americans, not entitled to this new religious property right, would clearly be disadvantaged and unfairly treated. In particular, non-Indian Americans who are current and potential users of federal lands face economic harm and insecure futures because they will be indefinitely vulnerable to having their rights and activities preempted and terminated by this new religious property right available only to Native Americans.

The enormous potential impact of S.1124 on federal lands, land management, and use by non-Indians may be illustrated by a few examples of the religious land claims which Indians have brought in recent years. These claims to public land, for the most part, have been absolute and all-encompassing in character because they have been based on Indians' assertions that their traditional religions give them a superior right to enjoy federal land. If S.1124 were enacted, these types of claims would succeed, to the disadvantage of all other Americans.

The G-0 Road Case. As discussed above, Indians in this case claimed the right to control twenty-five square miles of a national forest. While the case focused on the Indians' opposition to a single road, the Supreme Court pointed out that the Indians' claim, if recognized, would allow them to exclude "all human activity" from the area in the name of religion. Because the Indians claimed that their religious practices required privacy, silence and isolation in a totally natural environment, virtually any activity in the area would pose a threat to their religious practices. Lyng, 99 L.Ed.2d at 549.

The Black Hills Case. As discussed above, a small group of Lakota Indians claimed 800 acres in the Black Hills National Forest. Although the area had no prior particular religious significance, they claimed that their religion entitled them to use it (and to exclude others from the area by means of a locked gate) because the Black Hills was a traditional religious area for the tribe. United States v. Means 627 F.Supp. 247, 251-52 (S.D. 1985), rev'd, 858 F.2d 404 (8th Cir. 1988).

Sweet Grass Hills Case. In this case, before the Interior Department Board of Land Appeals, the Blackfeet Tribe is seeking effective control over an area of 210,000 acres of public and private land in north central Montana. The Tribe claims that the entire area has religious significance, though it has not to date identified even one specific religious site. The only development project at issue is a proposal to construct six drill sites, six exploratory drill holes, and less than two miles of access road. In spite of the quite limited nature of the proposed project, the Tribe is demanding that the entire 210,000 acre area be kept free from any development activity because of the area's alleged religious significance to the Blackfeet. Blackfeet Tribe v. BLM. IBLA 86-1440.

The Navajo-Hopi Land Dispute. In this case, currently pending in the United States District Court for the District of Columbia, a group of 52 Navajos is claiming the right to an area of Hopi land on the basis that their possession and use of the area is essential to their practice of religion. The Navajos identify 81 religious sites in the area, although as recently as 1975 they had claimed only that two religious sites were in the area. On the basis of these religious sites, the Navajos assert that their rights under the American Indian Religious Freedom Act and the First Amendment would be violated if they were not permitted to remain in control of the area. See Complaint and Hopi Memorandum, Manybeads v. United States, No. 88-0181-GAG.

The Havasupai -- Canyon Mine Case. In this case, currently pending in the United States District Court for the District of Arizona, the Havasupai oppose the development of a small (17 acres), underground mine, on the ground that its existence is inconsistent with their religious beliefs and practices. In support of their position, the Havasupai claim that their area of religious significance encompasses the entire (but imprecisely defined) territory between the Grand Canyon in the north and the cities of Williams and Flagstaff, Arizona in the south. The claimed area is well over a million acres. In this area, the Havasupai claim to have over a thousand sacred religious sites. See Havasupai testimony before the Regional Forester, May 14, 1987, at 50,60; Havasupai testimony before the Office of the Chief, February 27, 1987, at 50, Canyon Mine Appeal Forest Service Nos. 1874, 1868. Indeed, the Havasupai claim that "[a]ll of the springs and seeps" on their aboriginal land (2.2 million acres) are sacred and essential to the preservation of their religion and culture. Canyon Mine Final Environmental Impact Statement, Appendix G at 74.

The Acoma Tribe -- El Malpais National Monument Dispute. The Acoma Indians opposed the creation of the El Malpais National Monument and a related conservation area on religious grounds. They argued that they practice their religion and have numerous religious sites throughout a 13,000 acre area of federal land. Consequently, they insisted that the area should not be included in the monument and conservation area because such inclusion would interfere with the Acoma's religious practices, by opening up the area to public use. Stumbo, Tribe Fights to Preserve Sacred Land, L.A. Times, Dec. 26, 1987, pt. I, at 1, col. 1.

The above examples illustrate the enormous scope and all-encompassing nature of Indian religious land claims. Every imaginable use of federal lands can be, and has been, said to threaten or interfere with Indian religious practices. Thus it is clear that S.1124, by creating a statutory preference for threatened Indian religious interests, will impair greatly the public's access to federal land, harm the development of the nation's natural resources, and interfere severely with the government's management of public lands.

IV. S.1124 WILL CAUSE AN ENORMOUS AND DISRUPTIVE INFLUENCE ON ALREADY LOG-JAMMED FEDERAL COURTS BY SPAWNING ENDLESS LITIGATION.

As noted above, Native American Indian attempts to obtain preferential religious control over federal land has already spawned a multiplicity of litigation. S.1124 only invites long and protracted litigation as the courts attempt to deal with the multitude of issues it raises. Among the issues which S.1124 will raise which must be dealt by the court are:

1. What federal lands have historically been considered sacred and indispensable?

2. What does "sacred and indispensable" mean?

3. What are "traditional" Native American Religions?

4. Which federal lands are "necessary" to the conduct" of a Native American religious practice?

5. What is a "substantial and realistic threat"?

6. How do such threats "undermine and frustrate" religions or religious practices?

7. Does the government do anything outside of its "legal responsibilities"?

8. How does the "legal responsibilities" standard differ from the "compelling governmental interest"?

9. What must a federal agency do to demonstrate that it has "attempted to accommodate the various competing interests"?

10. How can a federal agency demonstrate that it has "selected the course of action that is the least intrusive" on traditional Native American religions?

11. When is the public "totally denied public access" to federal lands?

12. Finally, what assurance does the public have that the federal government will adequately and fully litigate any of these issues in the public interest? Will not the government simply accede to Indian claims given that federal agencies are charged with the obligation to protect Indian interests? It is quite possible that federal agencies will fail to represent adequately the interests of non-Indians because of the burdens placed on them by S.1124.

V. S.1124 IS NOT NECESSARY BECAUSE NUMEROUS EXISTING STATUTES AND REGULATIONS PROVIDE ADEQUATE PROTECTION TO NATIVE AMERICAN CULTURE AND RELIGION.

It has been suggested that S.1124 is needed because a recent Supreme Court decision has deprived Native Americans of effective protection for their religious freedoms. Such is not the case. The Supreme Court's 1988 Lyng decision simply refused to grant greater rights to Native American religions than exist for other religions. In particular, Lyng held that the right of religious freedom cannot be used to create a special Indian religious private property right to public land. In other words, the First Amendment cannot be used by one group of Americans to deprive the federal government of the power to manage public lands or to exclude other Americans from enjoying and having access to land which ultimately belongs to all Americans. Under Lyng no Native Americans were prevented from using or continuing to use federal land for their religious purposes. Indeed, as the Supreme Court pointed out, the Forest Service had gone to great lengths to accommodate the Indians' religious activities on forest service land, and continues to do so today. Because the Lyng decision did nothing more than reiterate the fundamental Constitutional principle that the right of religious freedom applies equally to all Americans, but gives no special privileges to some which are denied to others, the decision creates no need for new legislation.

Because S.1124 is an amendment to the American Indian Religious Freedom Act ("AIRFA"), it is appropriate to point out that AIRFA is an effective statute and is not in need of amendment. It has been said that AIRFA "has no teeth in it" because it does not guarantee any special rights or privileges to Native Americans. This is not correct. AIRFA ensures that the First Amendment right of religious freedom is enjoyed by Native Americans as fully as it is enjoyed by all other Americans. AIRFA cannot and should not be used to unconstitutionally grant special rights to a select group of Americans while denying those rights to others. In any case, AIRFA already ensures that Indians have a special status in federal land management decisions.

AIRFA and other statutes presently in effect insure that federal land management practices and policies are sensitive and responsive to Native American religious interests. Indeed, as the following discussion indicates, the statutes and regulations governing the Forest Service and the Bureau of Land Management ("BLM") give Indian tribes a special measure of influence when it comes to land management decisions. Far from being indifferent or hostile to Native American religious concerns, the Forest Service and the BLM, in compliance with their regulations and policies, act to involve Indian tribes and to accommodate their religious concerns in every aspect of federal land management.

The National Forest Management Act, 16 U.S.C. SS 1600-1614 (1982), requires the Forest Service to develop and adopt land and resource management plans for the National Forest system. Among the principles on which forest planning must be based is the protection and preservation of the inherent right of American Indians to believe, express, and exercise their traditional religions. 36 C.F.R. §219.1(a)(6)(1987). In addition, the Forest Service is required to identify, protect, and manage all significant cultural resources on National Forest lands, including Native American cultural resources. Id. § 219.24. The Forest Service is also required to coordinate regional and forest planning with the planning efforts of Indian tribes, to notify tribes whose lands or treaty rights are expected to be affected by the agency's activity, to review and consider the objectives of Indian tribes as expressed in their plans and policies, and where conflicts are identified, to consider alternatives so that the conflicts may be resolved. Id. 219.7. In short, the Forest Service's land management planning already gives special treatment to Indian tribes as interested parties, and expressly provides that American Indian religious practices must be respected.

The Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701-1784, requires the Secretary of the Interior to develop and implement land use plans for the use of public lands administered by the BLM. 43 U.S.C. § 1712. The BLM, under its regulations implementing FLPMA, is required to provide for meaningful involvement of Indian tribes in the development of resource management plans. 43 C.F.R. § 1610.3-1(a). The BLM is expressly required to provide "Indian tribes opportunity for review, advice, and suggestion on issues and topics" of importance to them. Id. § 1610.3-1(b). The BLM is also required to notify Indian tribes when it intends to prepare, amend, or revise a resource management plan. Id. § 1610.3-1(d). The importance of Native American religion and the requirement for consultation with Native Americans is expressly incorporated into the BLM Manual, part 1623.14(b), which provides:

> [P]ursuant to the American Indian Religious Freedom Act, Indian tribal leaders should be consulted with respect to any management and objectives which might affect tribal religious values Federal agencies must obtain and consider the views of Indian leaders during the land use decision making process, and avoid unnecessary interference with Indian religious practices during project implementation.

In sum, the Forest Service and the BLM are both required to consider and respect American Indian religious concerns in their land use planning. Native American religious values can be protected by the agencies in the ongoing planning process if the Native Americans will advise the agencies in advance of the need for protection. Once a Native American interest receives protection in a land use plan, an agency cannot permit subsequent actions that are inconsistent with that interest.

Aside from the statutes and regulations governing public land planning, a variety of other statutes applicable to the Forest Service and the BLM help ensure that Native Americans are involved in and served by land management decisions.

The National Environmental Policy Act ("NEPA"), 43 U.S.C. S4321, requires federal land management agencies to prepare environmental impact statements for major federal actions having a significant effect on public lands. As part of the process for determining the scope of issues to be addressed in an environmental impact statement, agencies are specifically required to invite the participation of affected Indian tribes. 40 C.F.R. S 1501.7(a)(1).

Under the National Historic Preservation Act, 16 U.S.C. SS 470-470w-6, the head of any federal agency having jurisdiction over a proposed federal undertaking, or having authority to license any non-federal undertaking, must take into account the effect that such activity may have on any site that is eligible for inclusion in the National Register of Historic Places. This includes sites that are "significant in American history, architecture, archaeology, engineering or culture." 36 C.F.R. S 60.1. Under the regulations implementing the Act, federal agencies such as the Forest Service and the BLM must determine whether their management activities will adversely affect significant historical or cultural sites. Where adverse effects may result, the agencies must consult with interested parties, such as Indian tribes, to avoid, mitigate or minimize the adverse effects. See 36 C.F.R. SS 800.4, 800.6.

Indian tribes also receive special consideration under the Archaeological Resources Protection Act of 1979, 16 U.S.C. SS 470aa-470ll. The Act prohibits the disturbance or destruction of archaeological resources, including Native American religious and cultural sites, located on public lands except under a permit issued by the appropriate federal land manager. If issuing a permit, under the Act, may harm or destroy any Indian religious or cultural site, the federal land manager must notify and consult with concerned Indian tribes.

The Forest Service and the BLM have adopted uniform regulations for the protection of archaeological resources. These regulations specifically require federal land managers to take into consideration the American Indian Religious Freedom Act when issuing permits for the excavation or removal of archaeological resources. 43 C.F.R. § 7.1(a); 36 C.F.R. § 296.1(a). In addition, representatives of any Indian tribe may request to meet with the federal land manager to discuss their interests, including ways to avoid or mitigate potential harm or destruction, such as excluding particular sites from a permit area. See, e.g., 36 C.F.R. § 296.7(a)(3). Federal land managers are also required to attempt to identify all Indian tribes having aboriginal or historic ties to the lands under that manager's jurisdiction and to determine the location and nature of specific sites of religious or cultural importance so that information may be kept on file for land management purposes. Id. Land managers may also enter into agreements with Indian tribes for determining locations for which such tribes wish to receive notice. Id.

A recent example of cooperation between the Forest Service and Indian tribes illustrates how these regulations protect Indian religious and cultural values. The Southern and Eastern Regions of the Forest Service have, in conjunction with Indian tribes, implemented a policy of leaving intact and undisturbed both prehistoric and recent grave sites and homesteads. Under the policy, Forest Service managers in each state deal directly with tribes to work out a plan to handle each grave site. In West Virginia national forests, this policy applies even though there are no active American Indian tribes left in the state. See Old Burial Site to Remain Intact Under a New Federal Policy, N.Y. Times, May 10, 1988, at A 26, col. 1.

The statutes, regulations, and policies outlined above indicate that government agencies are today sensitive and responsive to Indian religious concerns in the management of federal land. Indian tribes are given multiple opportunities to play a meaningful and effective role in land management decisions. By availing themselves of these opportunities, Native Americans can ensure substantive protection for their religious and cultural interests and activities.

VI. RECOMMENDATIONS BASED ON THE PRINCIPLES OF MULTIPLE USE, ACCOMMODATION OF INTERESTS, AND COOPERATION AMONG PARTIES.

S.1124 should be very carefully considered before any further action is taken on it. Among the issues which should be fully examined are the following:

A. The impact of S.1124 preference for Indian religious interests on the government management of federal lands.

B. The impact of S.1124 on the responsible development of natural resources on federal lands.

C. An up-to-date assessment of the adequacy of existing statutes, regulations, and agency policies in responding to the religious concerns of American Indians.

D. An assessment of the nature and extent of the participation of Native American groups in federal land use planning and decision making under existing law to evaluate, not only the responses of federal agencies, but also the attitudes of Native American groups to factual disclosure, compromise, accommodation and litigation.

E. An assessment, based on precise, detailed factual information, of the extent of Indian religious use of federal lands, including a determination of the number and location of Indian religious sites, which under S.1124 might prohibit or impair otherwise lawful activities on federal land.

F. An examination of the constitutionality of S.1124.

If any legislative action is taken with respect to Indian religious use of federal lands, it should be based on the principles of multiple use, accommodation of interests, and cooperation among interested parties. It should not be based on the principle of giving preferential treatment to one group to the disadvantage of all others. Many existing statutes provide for multiple uses of federal lands while providing effective protection for Native American religious concerns. For example, the statute establishing the Mono Basin National Forest Scenic Area provides that the government "shall ensure nonexclusive access to Scenic Area lands by Indian people for . . . traditional cultural and religious purposes." The Act also mandates that the Forest Service consult with Indian tribes to identify their cultural and religious uses of the area. 16 U.S.C. 543f. Similarly, the recently passed El Malpais National Monument Act, Public Law No. 100-225 (December 31, 1987), guarantees "nonexclusive access to the monument and the conservation area by Indian people for traditional cultural and religious purposes." This approach of mutual respect and accommodation of multiple interests, rather then unilateral preference for one group, should be the basis of all legislation concerning the management of federal lands.

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October 16, 1989

The Honorable John McCain
United States Senator
United States Senate Select Committee
on Indian Affairs
Washington D.C. 20510-6450

Re: S.1124

Dear Senator McCain:

Thank you for your letter of October 2, 1989 as well as the opportunity to testify before the Senate Select Committee on Indian Affairs regarding S.1124 on September 28, 1989. Below I address the seven questions contained in your letter, and I hope that the information is helpful to you and your committee in considering S.1124.

1) In the current administrative process how much deference is given by federal agencies to tribal claims regarding the threat posed to the religion, and the character and location of the area affected by the sacred site?

I believe that this question is better addressed to the relevant government agencies and the Indian tribes who interact with them. I can say, however, that the recent record indicates substantial sensitivity by government agencies to Indian cultural and religious concerns. Pursuant to the American Indian Religious Freedom Act ("AIRFA"), many statutes affecting agency actions as well as numerous regulations and manuals adopted by the agencies themselves require the agencies to be responsive to Indian religious and cultural concerns. Under these statutes and regulations, American Indians have an unique status in the administrative process, not enjoyed by any other group. In this process, Indian cultural and religious interests are specifically identified as mandatory subjects of administrative concern and attention. Agency communication and consultation with Indian tribes on these matters is required, and is actually being carried out.

I have identified some of these statutes and regulations in my written testimony on S.1124, submitted to the Select Committee, at pp. 29-35. As an example of agency accommodation to Indian religious concerns, I would like to mention the National Park Service's "Native American Relationships Management Policy," adopted on September 22, 1987. 52 Fed. Reg. 35674 (1987). The stated purpose of the Policy is to implement AIRFA by having the Park Service carry out "its programs in a manner that reflects knowledge of and respect for the cultures, including religious and subsistence traditions, of Native American tribes or groups." 53 Fed. Reg. at 35675. This Policy ensures that Native Americans are free to practice their traditional religions on Park Service land:

> Members of Native American tribes or groups shall be permitted to perform traditional religious or other customary activities at places within park areas which have been used historically for such purposes, . . .

53 Fed. Reg. at 35676.

This Policy has been recognized as "A very well intentioned Policy" by Indian rights advocates. See Testimony of Steven C. Moore before the United States House of Representatives Interior and Insular Affairs Committee on H.R.1546, July 18, 1989, at p. 17. This Policy and others like it indicate that today the agencies are sensitive and accommodating to Indian religious concerns.

I believe that these statutes and regulations also put to rest the claim that AIRFA is ineffective. Far from being ineffective, AIRFA has been implemented through these statutes and regulations governing agency management of federal lands. By this process, AIRFA has achieved its legislative purpose of making government agencies sensitive and responsive to Indian religious concerns and accommodating to the needs of their religious practices.

A review of the Supreme Court's 1988 Lyng decision illustrates that government agencies are sensitive and accommodating to Indian religious concerns in practice, not just on paper. While proponents of S.1124 at times characterize Lyng as insensitive to Indian religious concerns, the actual facts of the case show a great deal of sensitivity and concern for Indian religion and culture by the Forest Service. The Forest Service in that case demonstrated its sensitivity and deference to Indian religious concerns in multiple ways. First, the Forest Service commissioned an exhaustive study of Indian religious and cultural interests in the National Forest area at issue. This study became the basis of the Forest Service's action in the area. Lyng, 99 L.Ed. at 550.

Second, the Forest Service set aside 500-acre protective zones, free from development, around each of eleven religious sites identified by the Indians as places of Indian religious practice. Id. at 543. Third, the Forest Service relocated the six-mile length of road at issue (the controversy concerned paving six miles of an already existing road) to a place most distant from the areas of Indian religious practice. The Forest Service also designed the road so as to minimize any audible intrusion or visual impact on the surrounding area. Id. at 550. "Such solicitude," the Supreme Court observed, "accords with 'the policy [of AIRFA] to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.'" Id. at 550.

Such accommodation, however, was not sufficient for the Indian litigants in Lyng, who demanded that an entire 25 square mile area of public land be set aside for their exclusive use. Id. at 553. Given the extraordinary scale and unqualified character of the Indian litigants' claim for "de facto" ownership of public land, it is not surprising that their claim was denied. Lyng thus illustrates both that AIRFA is already a functioning statute achieving its legislative purpose, and that government agencies are substantially sensitive and responsive to Indian religious concerns.

2) S.1124 would require the agency to determine whether there is a substantial and realistic threat to a Native American religious practice. Is it your position that the federal agency will absolutely defer to tribal groups in making this determination?

I believe that the "substantial and realistic threat" standard is unworkable as a practical matter and would necessarily involve unconstitutional governmental "entanglement" with religion if an agency were to attempt to determine whether a proposed activity on federal land poses such a threat to Indian religious practice. Consequently, a governmental agency would have no alternative but to defer to Indian groups in their making this determination for themselves.

The standard is unworkable because of its vagueness: "substantial and realistic" is not subject to precise definition or objective application. It is also unworkable because only Indian religious practitioners are in a position to know their religious beliefs,practices, or needs. Consequently, any agency attempting seriously to apply the standard would face the difficulty of having to determine what an Indian religion is, what its beliefs are, and what its practices consist of. In doing so, an agency might conclude that an Indian religion is different than it is said to be by its practitioners. Such a result would be obviously bizarre and improper, yet the agency would have to make such determinations in order to carry out its responsibilities under S.1124. Only by making such religious determinations could an agency be in a position to decide what proposed activities would pose a "substantial and realistic threat" to an Indian religion. No agency is qualified to make such determinations about the religious beliefs and needs of others, and to do so would violate the Constitution.

Such intrusion into religion by a government agency is clearly unconstitutional because it "entangles" government with religion. Thus, if an agency were to attempt to carry out the mandate of S.1124, its actions would violate the Establishment Clause of the First Amendment. .This kind of unconstitutional entanglement is graphically illustrated in the Supreme Court's 1987 decision, Corporation of Presiding Bishop v. Amos, 107 S.Ct. 2862 (1987). In that case, the issue was whether the exemption from the employment anti-discrimination provisions of Title VII of the Civil Rights Act of 1964 applied to a gymnasium operated by a church. The district court held that the exemption could not properly be applied to the gymnasium because the gymnasium was a secular activity, not religious. The Supreme Court unanimously reversed explaining that the government could not constitutionally distinguish between a church's secular and religious activities, because to do so would necessarily entangle government in religion.

In a careful and sensitive opinion, Justice Brennan explained that while in principle the statutory exemption should apply only to religious activities of a church, the law would have to be applied to all activities without distinction, because any other approach would produce unconstitutional entanglement.

> What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, *determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs*. . . . While a church may regard the conduct of certain functions are integral to its mission, a court may disagree. . . . A case-by-case analysis for all activities therefore would both produce excessive governmental entanglement with religion and create the danger of chilling religious activity.

Amos, 107 S.Ct. at 2872 (emphasis added).

Obviously, if the government cannot constitutionally distinguish between a religious organization's "secular" and "religious" activities, the government cannot intrude into religion itself to make far more subtle distinctions among religious beliefs and practices. Yet S.1124 would require just that. A federal agency would have to determine which federal lands have been "sacred and indispensable" to Indian religions and which have not, which lands are currently "necessary" to Indian religious practice and which are not, and finally what other activities "pose a substantial and realistic threat" to Indian religion and religious practice and which do not. As the Supreme Court pointed out in *Lyng*, to have the government decide which lands are "indispensable" or "necessary" to a religion and which lands are merely "dispensable" or "useful but not necessary," or to decide what other activities pose a "substantial and realistic" threat to a religion or merely an "insubstantial" or "minor" threat can only entangle government with religion in violation of the Establishment Clause. *Lyng*, 99 L.Ed.2d at 552.

Because of the entanglement problem, government will have no choice, under S.1124, but to defer wholly to Indian groups' own statements about their religions and threats to them. Mr. Reid Chambers, who testified in favor of S.1124, declared that such absolute deference to Indian religious claims is the *only* way to avoid unconstitutional entanglement.

> I am concerned that federal agency inquiries into matters such as whether a particular site is "indispensable" to an Indian religion, or whether an Indian religion is "traditional," could impermissibly "entangle"

> government with religion. [Therefore], it should be sufficient . . . if a tribe or Indian religious groups certifies that a particular site is central to its religion, . . . No further administrative inquiry should be permitted, and the agencies should defer to certifications by bona fide Indian religious groups.

Testimony of Reid Peyton Chambers Before the Senate Select Committee on Indian Affairs, Re: S.1124, September 28, 1989, at p. 7.

Obviously, Mr. Chamber's recommendation for self-validating Indian "certifications" combined with the absence of administrative inquiry into Indian religious claims constitutes de facto governmental delegation of public authority to private groups. Yet, as Mr. Chambers correctly points out, such an outcome is necessary under S. 1124 to avoid unconstitutional entanglement with religion. Thus, Mr. Chambers' testimony makes clear that absolute deference and indeed capitulation by the federal government to the claims and demands of Indian groups asserting traditional religious practices will be the result of S.1124, if it is to avoid unconstitutional entanglement with religion.

3) How do you respond to the argument that S.1124 presents a constitutionally protected accommodation, by removing barriers to religious practice under the Free Exercise Clause of the constitution?

S.1124 cannot be justified as merely removing barriers to Indian religious practices because no "barriers" are identified nor are any barriers removed by the bill. Rather, the bill affirmatively creates a special preference and elevated status for traditional Indian religions over all other religions as well as over all other uses of federal lands. Such denominational preference cannot be disguised nor justified as "accommodation" or the mere removal of "barriers."

For a statute to satisfy the "accommodation" principle of the First Amendment, it must have two features, neither of which are present in S.1124. First, the statute must not permit, let alone mandate, the government "from abandoning neutrality" among religions. Amos, 107 S.Ct. at 2868. Yet S.1124 clearly abandons neutrality by favoring traditional Indian religions over all others. As the Congressional Research Service observed, "the legislation singles out one type of religion, Native American religion, or historically based Native American religion, for special treatment to the exclusion of all other types of religion." Congressional Research Service, "Proposals to Amend the American Indian Religious Freedom Act," June 30, 1989, at CRS-10. In short, S.1124 clearly fails the "neutrality" requirement of the accommodation principle.

Second, a statute accommodating religion must be one which minimizes governmental involvement in religion, and thereby "allows" religions of all types to pursue their own affairs. Amos, 107 S.Ct. at 2868-69. By entangling government in traditional Indian religions, S.1124 does the opposite. In sum, by affirmatively creating a preferential status for just one type of religion and entangling government with religion, S.1124 does not and cannot satisfy any of the requirements for Constitutional accommodation of religion.

4) Apart from the administration consultative process, what avenues, in your experience, are available for Native American Religious leaders seeking to protect their rights to access to religious sites, given the Lyng decision?

The statutory and regulatory protections for Indian religious interests are substantial and should not be overlooked or minimized. In particular, Indian rights of access to sacred sites and traditional areas of religious practice are expressly recognized in numerous statutes and regulations. See the discussion in response to Questions 1 and 7.

Outside of the administrative process, American Indian religious practitioners have exactly the same First Amendment rights of freedom of religion as do other Americans. When necessary, American Indians can assert their First Amendment rights in court as they have done and continue to do so. Lyng in no way undermines American Indians' right of access to religious sites. Lyng simply refused to recognize an exclusive Indian de facto property right or "religious servitude" to public land. 99 L.Ed.2d at 549.

The issue of Indian rights "to access to religious sites" was not at issue in Lyng. The Supreme Court clearly explained that the Forest Service had not denied any Indians access to sacred sites. Indeed, the Indian litigants did not claim that they had been denied access to sacred sites. As mentioned above, each prayer site was recognized and protected by a 500-acre buffer area. What was at issue was the Indians' demand that the entire surrounding area of 25 square miles not be available for use by others so that they could enjoy the "privacy" and "undisturbed naturalness" they wished to have. 99 L.Ed.2d at 549. In any case, the Supreme Court went out of its way to stress that it was not approving or encouraging any denial of access to religious sites.

> Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to the use of its land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents.

Id. at 549.

In sum, nothing in Lyng in any way undermines or limits American Indians' right of access to religious sites on federal land. Moreover, S.1124 does not attempt to protect any Indian religious right of "access" to sacred sites. Rather, the bill will have the effect of denying other Americans access to and use of public lands.

5) How would the development of a standard of "least intrusive means" change existing departmental policy among the federal agencies regarding the protection of Native American religious sites?

Adoption of the "least intrusive means" standard for management of federal lands would have an obvious result: no activity opposed by an Indian group on religious grounds would be permitted. Several facts make this clear. First, when the "least intrusive means" standard is applied by the courts in other areas, the proposed governmental action is virtually never permitted. This is so because it can never be shown that any proposed action is the absolutely "least intrusive" possibility. Second, with respect to activities on federal land, there is always the "no action" alternative, i.e., denial of the proposed action altogether, which will always be the "least intrusive" option. Currently, under the National Environmental Policy Act ("NEPA"), all significant proposed activities on federal land must be reviewed under NEPA and the "no action" alternative must be considered. Consequently, "no action" will necessarily be the possible course of action which is "least intrusive" on any claimed Indian religious interest.

Finally, it must be kept in mind that S.1124 combines the "least intrusive means" requirement with the "compelling governmental interest" requirement. No proposed activity on federal land -- whether it be recreation, agriculture, resource development, or road building -- will ever be able to satisfy these two requirements.

6) What standard is currently used in evaluating the agency's decisions regarding Federal land management impacting Native Religious sites?

I believe that government agencies currently apply principles of multiple use, accommodation of interests, and cooperation among interested parties in making federal land management decisions affecting Indian religious concerns. With respect to the issue of Indian "access" to religious sites, I believe that agencies have long recognized and respected nonexclusive Indian access to and use of areas of traditional religious significance. Indian rights of access are expressly recognized in many statutes and regulations.

7) Would you suggest that S.1124 be amended to allow any religion to exercise the rights created under S.1124?

If S.1124 were amended to apply to all religions, the bill would still be unconstitutional in two respects. First, if the bill's preferential provisions remained applicable only to religions which traditionally used the land, its unconstitutional preference for one type of religion would continue. Since only Indian religions would satisfy this requirement, any ostensible extension of the bill to encompass other religions would be merely cosmetic. Indian religions would still receive preferential treatment with respect to federal land in violation of the Establishment Clause. Second, the bill would still "entangle" government with religion, and on that ground be unconstitutional.

I believe that S.1124 should be amended so that it does not give preferential treatment to any one type of religion in violation of the Establishment Clause. S.1124 should also be amended so as to embody the principle of multiple use of public lands for all Americans, rather than the notion of preferential use by just some Americans which the bill now expresses.

Other recently enacted statutes provide better models for appropriate legislative action than does S.1124 in its present form. I have attached two examples to illustrate a better approach to insuring proper protection for traditional Indian religious concerns. The Mono Basin National Forest Scenic Area Act, 16 U.S.C. § 543, provides for "nonexclusive access" to Forest Service land by "Indian people" for "traditional cultural and religious purposes." Additionally, the Act mandates agency "consultation with appropriate Indian tribes" for the purpose of ascertaining Indian cultural and religious uses of the area so that the Indian right of access can be implemented and effectively guaranteed. 16 U.S.C. § 543f. (See Exhibit 1 hereto.)

The El Malpais National Conservation Area Act, 16 U.S.C. §460uu-21 et seq., establishes a detailed scheme for protecting traditional Indian religious practices on federal land. First, the Act guarantees "nonexclusive access to . . . the conservation area by Indian people for traditional cultural and religious purposes." 16 U.S.C. § 460uu-47(a). Second, the agency managing the area is required to request from affected Indian tribes recommendations on (1) assuring Indian access for cultural and religious purposes, (2) "enhancing the privacy of traditional cultural and religious activities in . . . the conservation area," and (3) "protecting traditional cultural and religious sites in . . . the conservation area." 16 U.S.C. § 460uu-47(b). Third, the Act provides that, upon request by concerned Indian tribes, portions of the conservation area may be closed to the general public "in order to protect the privacy of religious activities in such areas by Indian people." 16 U.S.C. § 460uu-47(c). Finally, the Act provides for the creation of an "advisory committee" of concerned Indian tribes to advise the government and to monitor the implementation of the above provisions on an on-going basis to ensure that Indian cultural and religious concerns are effectively protected. 16 U.S.C. § 460uu-47(d). (See Exhibit 2 hereto.)

The provisions of the above two Acts I believe are far preferable to those of S.1124 in its present form. These Acts combine appropriate protections for traditional Indian religious practices without depriving other Americans of their rights to enjoy and benefit from the public lands. These Acts also provide for cooperation and involvement by concerned Indian groups in the administrative process, which not only insures better practical results, but also avoids the sweeping, unpredictable consequences of S.1124's current provisions. I recommend that S.1124 be amended so as to adopt the approaches of the Mono Basin National Forest Scenic Area Act and the El Malpais National Conservation Area Act.

I hope that this information is of use to you in considering the issues and problems raised by S.1124. If I can be of any further assistance to you or your committee, please do not hesitate to contact me at your convenience.

Very truly yours,

Scott M. Matheson

Scott M. Matheson

SMM/sdr
Enclosures
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the New Mexico Academy of Science and appropriate conservation, wilderness, wildlife, industry, and other public interest groups.

(e) Objectives of plan

The plan shall prescribe specific research and management objectives necessary for the protection, management, and regulation of the research site as outlined in subsection (f) of this section.

(f) Management of site in accordance with objectives

The research site shall be managed in accordance with the following objectives:

(1) The principal research facility shall be managed primarily for scientific research purposes. Dispersed recreation, grazing, and other uses which the Secretary determines to be compatible with scientific research may be permitted.

(2) The research site shall be managed to enhance scientific research objectives. Scientific research activities and associated research equipment and structures shall be permitted within the research site in accordance with the plan.

(3) Roads shall be limited to those necessary for scientific research activities and other reasonable activities as determined by the Secretary. Motor vehicle use shall be restricted to roads designated in the plan.

(4) The landing of small instrumented research rockets shall be permitted to continue in portions of the research site designated for such purposes in the plan.

(Pub.L. 96-550, Title II, § 205, Dec. 19, 1980, 94 Stat. 3225.)

[1] So in original. Probably should be "principal".

Historical Note

References in Text. The National Forest Management Act of 1976, referred to in subsec. (b), is Pub.L. 94-588, Oct. 22, 1976, 90 Stat. 2949, as amended, which enacted sections 472a, 521b, 1600, and 1611 to 1614 of this title, amended sections 500, 515, 516, 518, 576b, 581h, and 1601 to 1610 of this title, repealed sections 476, 513, and 514 of this title, and enacted provisions set out as notes under sections 476, 513, 528, 594-2, and 1600 of this title. For complete classification of this Act to the Code, see Short Title of 1976 Amendment note set out under section 1600 of this title and Tables volume.

§ 543. Mono Basin National Forest Scenic Area; establishment

The area in the Mono Basin within and adjacent to the Inyo National Forest in the State of California, as generally depicted on a map entitled "Mono Basin National Forest Scenic Area" dated June 1983, and numbered 1983-3, is hereby designated as the Mono Basin National Forest Scenic Area (hereafter in sections 543 to 543h of this title referred to as the "Scenic Area"). Such map shall be on file and available for public inspection in the office of the Forest Supervisor, Inyo National Forest and in the office of the Chief of the Forest Service, Department of Agriculture. The Secretary of Agriculture (hereinafter in sections 543 to 543h of this title referred to as the "Secretary") may make minor revisions in the boundary of the Scenic Area after publication of notice to that effect in the Federal Register and

EXHIBIT 1

(i) Termination

The Board shall terminate ten years from the date of its first meeting.

(Pub.L. 98–425, Title III, § 306, Sept. 28, 1984, 98 Stat. 1637.)

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[1] So in original. Probably should be "Scenic Area".

§ 543f. Traditional Native American uses

In recognition of the past use of the Scenic Area by Indian people for traditional cultural and religious purposes, the Secretary shall insure nonexclusive access to Scenic Area lands by Indian people for such traditional cultural and religious purposes, including the harvest of the brine fly larvae. Such direction shall be consistent with the purpose and intent of section 1996 of Title 42. As a part of the plan prepared pursuant to section 543c(c) of this title, the Secretary shall, in consultation with appropriate Indian tribes, define the past cultural and religious uses of the Scenic Area by Indians.

(Pub.L. 98–425, Title III, § 307, Sept. 28, 1984, 98 Stat. 1638.)

§ 543g. Authorization of appropriations

In addition to other amounts available for such purposes, effective October 1, 1985, there are hereby authorized to be appropriated such sums as may be necessary to carry out the purposes of sections 543 to 543h of this title.

(Pub.L. 98–425, Title III, § 308, Sept. 28, 1984, 98 Stat. 1638.)

§ 543h. New spending authority

Any new spending authority described in subsection (c)(2)(A) or (B) of section 651 of Title 2 which is provided under sections 543 to 543h of this title shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.

(Pub.L. 98–425, Title III, § 309, Sept. 28, 1984, 98 Stat. 1638.)

Secretary is authorized to accept the donation of suitable signs and other informational devices for placement at appropriate locations.

(Pub.L. 100-225, § 204, Dec. 31, 1987, 101 Stat. 1541.)

PART C—EL MALPAIS NATIONAL CONSERVATION AREA

§ 460uu-21. Establishment of area; map and legal description

(a) In order to protect for the benefit and enjoyment of future generations that area in western New Mexico containing the La Ventana Natural Arch and the other unique and nationally important geological, archeological, ecological, cultural, scenic, scientific, and wilderness resources of the public lands surrounding the Grants Lava Flows, there is hereby established the El Malpais National Conservation Area (hereinafter referred to as the "conservation area"). The conservation area shall consist of approximately 262,690 acres of federally owned land as generally depicted on a map entitled "El Malpais National Monument and National Conservation Area" numbered NM-ELMA-80,001-B and dated May 1987. The map shall be on file and available for inspection in the offices of the Director of the Bureau of Land Management of the Department of the Interior.

(b) As soon as practicable after December 31, 1987, the Secretary shall file a legal description of the conservation area designated under this section with the Committee on Energy and Natural Resources of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives. Such legal description shall have the same force and effect as if included in sections 460uu to 460uu-50 of this title, except that the Secretary may correct clerical and typographical errors in such legal description. The legal description shall be on file and available for public inspection in the offices of the Director of the Bureau of Land Management, Department of the Interior.

(Pub.L. 100-225, § 301, Dec. 31, 1987, 101 Stat. 1541.)

§ 460uu-22. Management

(a) Provisions applicable

The Secretary, acting through the Director of the Bureau of Land Management, shall manage the conservation area to protect the resources specified in section 460uu-21 of this title and in accordance with sections 460uu to 460uu-50 of this title, the Federal Land Management and Policy Act of 1976 [43 U.S.C.A. § 1701 et seq.] and other applicable provisions of law, including those provisions relating to grazing on public lands.

(b) Hunting and trapping

The Secretary shall permit hunting and trapping within the conservation area in accordance with applicable laws and regulations of the United States and the State of New Mexico; except that the Secretary, after consultation with the New Mexico Department of Game and Fish, may issue regulations designating zones where and establishing periods when no hunting or trapping shall be permitted for reasons of public safety, administration, or public use and enjoyment.

(c) Prohibition of collection of green or dead wood for commercial purposes

Collection of green or dead wood for sale or other commercial purposes shall not be permitted in the conservation area.

(d) Grazing

Except as otherwise provided in section 460uu-32(b) of this title, within the conservation area the grazing of livestock shall be permitted to continue, pursuant to applicable Federal law, including sections 460uu to 460uu-50 of this title, and subject to such reasonable regulations, policies, and practices as the Secretary deems necessary.

(Pub.L. 100-225, § 302, Dec. 31, 1987, 101 Stat. 1541.)

EXHIBIT 2

applicable to the monument or the conservation area, as the case may be, shall apply to such incorporated lands.

(d) Prohibition on transfer of lands out of Federal ownership; withdrawal of lands from all forms of entry

(1) Except as otherwise provided in sections 460uu to 460uu–50 of this title, no federally-owned lands located within the boundaries of the monument or the conservation area shall be transferred out of Federal ownership, or be placed in trust for any Indian tribe or group, by exchange or otherwise.

(2) Except as otherwise provided in sections 460uu to 460uu–50 of this title, and subject to valid existing rights, all Federal lands within the monument and the conservation area and all lands and interests therein which are hereafter acquired by the United States are hereby withdrawn from all forms of entry, appropriation, or disposal under the public land laws and from location, entry and patent under the mining laws, and from operation of the mineral leasing and geothermal leasing laws and all amendments thereto.

(e) Discrepancies in citation of acreage; maps as controlling

The acreages cited in sections 460uu to 460uu–50 of this title are approximate, and in the event of discrepancies between cited acreages and the lands depicted on referenced maps, the maps shall control.

(f) Acceptance of lands proposed for donation

The Secretary is authorized to accept any lands contiguous to the boundaries of the Pecos National Monument (as such boundaries were established on December 31, 1987) which may be proposed for donation to the United States. If acceptance of such lands proposed for donation would be in furtherance of the purposes for which the Pecos National Monument was established, the Secretary shall accept such lands, and upon such acceptance such lands shall be incorporated into such monument and managed accordingly.

(Pub.L. 100–225, § 506(a)–(f), Dec. 31, 1987, 101 Stat. 1546.)

References in Text. The Federal Land Policy and Management Act of 1976, referred to in subsec. (b), is Pub.L. 94–579, Oct. 21, 1976, 90 Stat. 2744, which is classified generally to chapter 35 (section 1701 et seq.) of Title 43, Public Lands. For complete classification of that Act to the Code, see Short Title note set out under section 1701 of Title 43 and Tables volume.

§ 460uu–47. Access

(a) Nonexclusive access to Indians for cultural and religious purposes

In recognition of the past use of portions of the monument and the conservation area by Indian people for traditional cultural and religious purposes, the Secretary shall assure nonexclusive access to the monument and the conservation area by Indian people for traditional cultural and religious purposes, including the harvesting of pine nuts. Such access shall be consistent with the purpose and intent of the American Indian Religious Freedom Act of August 11, 1978 (42 U.S.C. 1996), and (with respect to areas designated as wilderness) the Wilderness Act (78 Stat. 890; 16 U.S.C. 131).

(b) Recommendations from Indian leaders regarding access and protection of cultural and religious sites

In preparing the plans for the monument and the conservation area pursuant to section 460uu–41 of this title, the Secretary shall request that the Governor of the Pueblo of Acoma and the chief executive officers of other appropriate Indian tribes make recommendations on methods of—

(1) assuring access pursuant to subsection (a) of this section;

(2) enhancing the privacy of traditional cultural and religious activities in the monument and the conservation area; and

(3) protecting traditional cultural and religious sites in the monument and the conservation area.

(c) Temporary closure to public of lands for protection of religious activities

In order to implement this section and in furtherance of the American Indian Religious Freedom Act, the Secretary, upon the request of an appropriate Indian tribe, may from time to time temporarily close to general public use one or more specific portions of the monument or the conservation area in order to protect the privacy of religious activities in such areas by Indian people. Any such closure shall be made so as to affect the smallest practicable area for the minimum period necessary for such purposes. Not later than seven days after the initiation of any such closure, the Secretary shall provide written notification of such action to the Energy and Natural Resources Committee of the United States Senate and the Interior and Insular Affairs Committee of the House of Representatives.

(d) Advisory committee; membership

The Secretary is authorized to establish an advisory committee to advise the Secretary concerning the implementation of this section. Any such advisory committee shall include representatives of the Pueblo of Acoma, the Pueblo of Zuni, other appropriate Indian tribes and other persons or groups interested in the implementation of this section.

(Pub.L. 100-225, § 507, Dec. 31, 1987, 101 Stat. 1548.)

References in Text. The American Indian Religious Freedom Act of August 11, 1978, referred to in subsecs. (a) and (c) is Pub.L. 95-341, § 1, Aug. 11, 1978, 92 Stat. 469, which is classified to section 1996 of Title 42, The Public Health and Welfare.

The Wilderness Act, referred to in subsec. (a), is Pub.L. 88-577, Sept. 3, 1964, 78 Stat. 890, which is classified generally to chapter 23 (section 1131 et seq.) of this title. For complete classification of that Act to the Code, see Short Title note set out under section 1131 of this title and Tables volume.

§ 460uu-48. Cooperative agreements with Federal, State and local public departments and agencies

In order to encourage unified and cost effective interpretation of prehistoric and historic civilizations in western New Mexico, the Secretary is authorized and encouraged to enter into cooperative agreements with other Federal, State and local public departments and agencies, Indian tribes, and nonprofit entities providing for the interpretation of prehistoric and historic civilizations in New Mexico and eastern Arizona. The Secretary may, pursuant to such agreements, cooperate in the development and operation of a multiagency orientation center and programs on lands and interests in lands inside and outside of the boundaries of the monument and the conservation area generally, with the concurrence of the owner or administrator thereof, and specifically in or near Grants, New Mexico, adjacent to Interstate 40 in accordance with the plan required pursuant to section 460uu-41 of this title.

(Pub.L. 100-225, § 508, Dec. 31, 1987, 101 Stat. 1548.)

§ 460uu-49. Water rights

(a) Reservation to United States of minimum amount of water required

Congress expressly reserves to the United States the minimum amount of water required to carry out the purposes for which the national monument, the conservation area, and the wilderness areas are designated under sections 460uu to 460uu-50 of this title. The priority date of such reserved rights shall be December 31, 1987.

(b) Effect on existing valid or vested water rights

Nothing in this section shall affect any existing valid or vested water right, or applications for water rights which are pending as of December 31, 1987 and which are subsequently granted: *Provided*, That nothing in this subsection shall be construed to require the National Park Service to allow the drilling of ground water wells within the boundaries of the national monument.

(c) Construction of section as precedent with regard to future designations

Nothing in this section shall be construed as establishing a precedent with regard to any future designations, nor shall it affect the interpretation of any other Act or any designation made pursuant thereto.

(Pub.L. 100-225, § 509, Dec. 31, 1987, 101 Stat. 1549.)

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MICHAEL J. WOODRUFF, ESQ
DIRECTOR

Testimony of Michael J. Woodruff, attorney and director of the Center for Law and Religious Freedom of the Christian Legal Society, Annandale, Virginia, before the United States Senate Select Committee on Indian Affairs, concerning S. 1124, "The American Indian Religious Freedom Act Amendments of 1989," on September 28, 1989.

Mr. Chairman and members of the Committee, I thank you for the privilege of testifying before the Senate Select Committee on Indian Affairs on S. 1124, "The American Indian Religious Freedom Act Amendments of 1989."

The Center for Law and Religious Freedom of the Christian Legal Society is devoted to First Amendment concerns. Since 1975, the Society, through the Center and/or its membership, has participated in many cases raising religious freedom issues. One of these cases, decided by the Supreme Court on April 19, 1988, was **Lyng v. Northwest Indian Cemetery Protective Association**, 99 L. Ed. 2d 534 (1988) (hereinafter Lyng). The Center filed a brief on behalf of the Christian Legal Society, the American Jewish Committee and Concerned Women for America as amici curiae, supporting the Native American Indian respondents whose religious liberty interests were imperiled by government conduct on federal land.

The argument contained in the amicus brief was premised on straightforward free exercise doctrine: that government may not destroy traditional Native American Indian religious sites or inhibit religious exercise at such sites, located on publicly accessible government land, without a compelling governmental interest not satisfied by less restrictive means. While this argument was rejected by the Court's majority in Lyng, the authorities cited in the brief are relevant as the Committee considers how best to protect these sacred sites. If, as the Court said, the government was not constitutionally compelled by the Free Exercise Clause to protect the respondents from an infringement upon their religious exercise, certainly there is room for federal legislation to voluntarily accommodate such exercise. The brief supports free exercise accommodation of the Native American Indian practices that are the subject of the bill. A copy of the brief is attached as **Appendix I.**

My remarks today are made solely on behalf of the Center, but are consistent with the legal position the amici took in the Lyng case and the scholarship it represents. The brief noted the

A ministry of the Christian Legal Society

substantial assistance in research and writing by Sarah Barringer Gordon, a Yale Law School and Divinity School graduate, now associated with the law firm of Fine, Kaplan and Black in Philadelphia.

The purpose of my testimony is to review the bill, S. 1124, from a legal and constitutional perspective, as it amends Public Law 95-341, 42 U.S.C. 1996, known as the American Indian Religious Freedom Act. The proposed legislation can, in my opinion, help protect Native American sacred sites without violating the Establishment Clause's prohibition of government sponsorship of religion or preference for one religion over another.

I. Congress may amend the American Indian Religious Freedom Act (AIRFA) to reconcile competing demands on government for public land use management and accommodation of traditional Native American religious practices without violating the Establishment Clause.

A threshold question which may be raised is whether this bill can accommodate traditional Native American Indian religious practices without violating the Establishment Clause. This question arises whenever legislation appears to have a religious purpose or to advance religious interests to the exclusion of secular interests. Cf. Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989) (Texas statute invalidated); Edwards v. Aguillard, 107 S. Ct. 2573 (1987) (Louisiana statute invalidated); Wallace v. Jaffree, 472 U.S. 38 (1985) (Alabama statute invalidated).

If legislation is religion-specific and appears to prefer one religion over others, the accommodation of one religion under the Free Exercise Clause seems in conflict with the Establishment Clause that mandates government neutrality as between religions. This problem has come to the attention of the Supreme Court in numerous cases and has been the subject of much legal commentary. See A.M. Adams and S.B. Gordon, "The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses," 37 DePaul L. Rev. 317 (1988) (hereinafter "Adams and Gordon"). I believe the constitutional question can be resolved by consideration of three salient points:

1. The Supreme Court in Lyng left room for Congress to amend AIRFA. If Congress addresses how demands in public land use management and accommodation of traditional Native American religious practices are to be reconciled, it would be consistent with the position taken by Justice O'Connor in her majority opinion in Lyng. Finding that the Constitution did not reconcile these demands, she wrote, "That task, to the extent that it is feasible, is for the legislatures . . . ," 99 L.Ed.2d 534, at 548. The Lyng opinion fairly invites Congress to amend AIRFA to provide judicially enforceable rights: "Nowhere in the law is there so much as a hint of any intent to create a cause of action

or any judicially enforceable individual rights," at 550.

2. The Supreme Court's Lyng decision tacitly invited Congress to accommodate religious practices like those at issue in that case.

> Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents. Lyng, at 549.

Where statutes are enacted that are purely enabling, not prescriptive, and where the purpose is to accommodate religious needs and do not use the resources and prestige of government to encourage or inculcate religion among the unwilling or the indifferent, government neutrality required by the Establishment Clause is maintained. The Supreme Court has recognized that there is room, or "play in the joints," between what the Establishment Clause prohibits and what the Free Exercise Clause requires for Congress to legislate in order to accommodate religion. Cf. Corporation of the Presiding Bishop v. Amos, 107 S. Ct. 2862 (1987) (the Establishment Clause permits accommodation of religious organizations in their employment practices, although the Free Exercise clause does not mandate the exemption provided by Title VII); also Adams and Gordon, supra, at 330ff. If the Free Exercise Clause did not mandate the accommodation of religious practices on government land in Lyng, legislation directed at the task of managing federal land on which sacred sites are located in such a manner as to maximize accommodation of religious exercise, is not prohibited by the Establishment Clause.

3. Congress may enact legislation to voluntarily remove or minimize a burden on, or infringement of, Native American religious practices on government land which would otherwise result from government action without an Establishment Clause violation. Put another way, Congress, operating within the space of what the Free Exercise Clause requires and the Establishment Clause prohibits, may voluntarily choose to accommodate religious practice and implement Free Exercise values where a serious harm to the religion by government action is threatened. See Adams and Gordon, supra, at 338ff. The Supreme Court in Lyng has already recognized that "the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices" and "the threat to the efficacy of at least some religious practices is extremely grave," at 548. Justice Brennan, in dissent, pointed out that the "proposed construction and logging activities will impair their freedom to exercise their religion in the greatest degree imaginable . . . ," at 561.

A fair reading of the Lyng opinions shows a Court in full agreement that the Native American religious practices are burdened. As Justice O'Connor wrote, ". . . the challenged government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs." While the verbal formulations between the opinions vary, there is little doubt that the threatened harm is clearly identified by the full Court. Given the fact that governmental action itself is the threat to the religious practice, a statute which accommodates religious practices by minimizing the potential conflict between governmental interests and religious practices should be fully constitutional.

II. S. 1124 should not confer standing to sue on any person contrary to the Constitutional requirements of Article III.

The proposed language in Sec. 3(c)(1) apparently allows a civil action brought by any person. There is no limiting language to comport with the requirements of Article III's "case" or "controversy" requirements. Thus, it indelicately intrudes on a separation of powers principle. In Allen v. Wright, 468 U.S. 737 (1984), the Supreme Court held that plaintiffs must satisfy three requirements to have standing under Article III. First, they must have suffered an injury in fact that is both concrete in nature and particularized to them. See Allen at 755. Second, the injury is to be traceable to the defendants' conduct. See Allen at 757. Third, the injury must be redressable by removal of defendants' conduct. See Allen at 758-759. Careful consideration should be given by members of the Committee to limiting standing to those persons who were injured or are threatened with harm to their religious practice as a result of governmental action. This would avoid a debate on the constitutionality of the standing provision and reduce unnecessary federal litigation by persons not actually harmed by government's management of its own land. See also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc. 454 U.S. 464 (1982); cf. ARM v. Baker, No. 1486 (2d Cir. Sept. 6, 1989) (plaintiffs lacked standing to challenge IRS' lack of enforcement of political activity restrictions against the Roman Catholic Church~~)~~.

III. Legislative accommodation of Native American religious practices to protect sacred sites on public lands should specify the public access to such Federal lands to reduce Establishment Clause concerns.

The concern raised here is primarily a long technical comment aimed at addressing a textual problem easily corrected. S. 1124 does not distinguish between Federal land to which the public has access and government land to which public access is denied, such as land reserved for military use. It simply identifies Federal land and sacred sites without differentiation for public or nonpublic access. The failure to identify the Federal land as public lands clouds the legitimacy of legislative accommodation of Native American religious practices. If Congress should confer an exclusive benefit on one religious group, an Establishment Clause claim may be stated by any person having the appropriate standing to sue. There was not such issue present in Lyng where the Court dealt with public lands covering some 17,000 acres to which recreational visitors, forest rangers and Native Americans had access. Access to the sacred sites was neutrally available to all.

If nonpublic lands were within the scope of this legislation, the absence of "equal access" or the preference for one group over others would undercut the Supreme Court's permissive nod to legislatures to protect religious practices by a voluntary accommodation that furthers Free Exercise values without fear of transgressing the Establishment Clause. The Establishment Clause is premised on government acting with equal impartiality toward all religions. The Free Exercise Clause may require an accommodation that will enable a religion to advance its own program. In between is space for legislatures to advance Free Exercise values without violating the Establishment Clause by impermissible government sponsorship. If exclusive access to sacred sites on restricted Federal lands is permitted to one class of persons for religious practices under S. 1124, an Establishment Clause or an Equal Protection argument may be made to claim access by a right of travel, a fundamental Fourteenth Amendment right. If an exclusive license to travel upon restricted Federal lands should not be broadly granted by S. 1124, the designation of the subject Federal land as "public lands" may be sufficient clarification.

It should be noted that the Native American respondents in Lyng did not seek to exclude others from the areas for which protection was requested. Had they done so, at least three justices had other constitutional concerns. See Brennan, dissenting, at 564 (joined by Marshall and Blackmun).

IV. The Supreme Court unquestionably narrowed the Free Exercise rights of Native Americans, but Congress has the opportunity to provide legislative accommodation in furtherance of important Free Exercise values.

A majority of the Supreme Court in Lyng held that the Free Exercise Clause did not prevent government action from virtually destroying the Indians' ability to practice their religion. The Constitution only protects individuals from being coerced by government into acting contrary to their religious beliefs if government action is not otherwise justified by a compelling interest.

Clearly, Congress would take the moral high ground to recognize that government action that coerces someone to act against their religious beliefs is a lesser evil than government action that has the direct effect of irrevocably destroying someone's ability to practice their religion at all. It seems anomalous for Congress, in the interest of accommodating Free Exercise values, to have within its power the opportunity to provide more protection for religious practice by legislation than the Supreme Court can provide through the Constitution. Nevertheless, equity compels seizing such an opportunity.

I commend the members of the Committee for their careful consideration of the legal aspects raised by the bill. I thank each of you for this opportunity to share my views with the Committee.

APPENDIX I

7

No. 86-1013

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

◆

RICHARD E. LYNG, Secretary of Agriculture, *et al.*,
Petitioners,

—v.—

NORTHWEST INDIAN CEMETERY
PROTECTIVE ASSOCIATION, *et al.*,
Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE ACLU FOUNDATION OF SOUTHERN CALIFORNIA, AND THE ACLU OF NORTHERN CALIFORNIA, INC., IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to furthering and defending the protections embodied in the Constitution and the Bill of Rights. Its local affiliates include the ACLU of Southern California and the ACLU of Northern California.

Throughout its history, the ACLU has consistently defended the right of individuals within our society to practice their religion free from unwarranted government interference. Thus, the ACLU has provided either direct representation or *amicus* support in virtually every religion case which has come before this Court since the 1930's.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of this Court.

The present case once again raises important issues regarding the scope and application of the free exercise clause. In particular, petitioners' attempt to reduce the level of judicial scrutiny in free exercise controversies is inconsistent with the notions of religious liberty embodied by the framers in the First Amendment.

STATEMENT OF THE CASE

Amici adopt the statement of facts se forth in the district court's opinion. 56 F.Supp. 586 (N.D.Cal. 1983).

SUMMARY OF ARGUMENT

I.

Respondents' right to the free exercise of religion would be violated by construction of the Chimney Rock section o the G-O Road because an indispensable element of their religious practice would be taken from them by the government without a compelling reason.

Contrary to the suggestion of petitioners and amici arguing in support of petitioners, the free exercise clause i not limited to situations in which the government compels religiously offensive conduct or a choice between government benefits and the practice of religion. Indeed, government action that precludes the practice of religion is the most egregious form of government interference with religion, and should be reviewed under the most exacting standard regardless of whether the government simultaneously compels religiously offensive behavior.

II.

Petitioners' novel argument that free exercise claims related to public lands should be treated the same as free speech claims involving nonpublic fora, and therefore reviewed under a reasonableness standard, is also misplaced.

As petitioners concede, the parks represent a "quintessential" public forum under this Court's decisions. Contrary to petitioners' contention, however, the notion of a quintessential public forum includes more than a right of access; it includes, as well, the right to engage in protected First Amendment activities unless overridden by a compelling state interest.

Respondents' past practices have, in any event, created a limited public forum. Petitioners and their ancestors have been using this land for religious purposes with government permission since the nineteenth century. The imposition of a new and significant burden on those practices is properly subject to strict judicial scrutiny.

Finally, the government's undisputed right to control its own property has never been extended to bar First Amendment activity that cannot take place at any other location. To the contrary, the Court has repeatedly stressed, even in nonforum cases, the existence of other opportunities for speech. Here, of course, respondents' religious rituals are site-specific. They cannot be moved without being destroyed.

III.

Finally, the claim of amici arguing in support of petitioners that granting an injunction against construction of the Chimney Rock section will create an establishment of religion is unsupported by precedent. The accommodation of legitimate free exercise clause claims in a religiously neutral manner does not represent an establishment clause violation. The numerous federal and state statutes and regulations that offer exemptions for religious practitioners bear witness to the tradition of acknowledging religion where that is necessary to avoid government interference with religious

practice. Furthermore, there is no establishment clause violation in this case even applying the traditional establishment clause test.

ARGUMENT

I. CONSTRUCTION OF THE CHIMNEY ROCK SECTION OF THE G-O ROAD WOULD CONSTITUTE A BURDEN ON RESPONDENTS' RELIGIOUS PRACTICES

The trial in this case established as a matter of fact that respondents will be unable to practice their religion if the Chimney Rock road is constructed as planned through the "high country." Specifically, the district court found that communication with the "great creator" in the high country is "central and indispensable" to the performance of respondents' rituals and ceremonies. 565 F.Supp. at 594. The court also found that respondents' religious leaders derive "power" through their experiences in the high country that are necessary to fulfill their traditional religious roles. *Id.*

As the Forest Service itself concluded in a pre-litigation report: "Intrusions on the sanctity of the . . . high country are . . . potentially destructive of the very core of the Northwest [Indian] religious beliefs and practices." *Id.*[2] There is, in short, little dispute that the unique function of the high country in respondents' religious life will be effectively destroyed by the noise, disturbance and pollution that will inevitably accompany road construction.

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[2] This Court has long recognized that even "indirect" burdens can substantially limit free exercise rights and thereby trigger strict scrutiny under the First Amendment. *E.g. Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

While acknowledging these likely consequences, petitioners dispute their constitutional significance by arguing that they do not represent a "burden" on respondents' free exercise rights. Petitioners' Brief at 22-23. Petitioners support this counterintuitive proposition with two alternative arguments. Neither is persuasive as a matter of logic or constitutional law.

First, petitioners argue that free exercise rights are burdened only if the government (a) compels conduct contrary to one's religious beliefs or (b) forces one to choose between one's religious belief and government benefits. *Id.* In the government's view, therefore, this is not a free exercise case even assuming that the completed road will prevent respondents from practicing their religion.

The government does not and cannot offer any explanation for the distinction it draws. Indeed, the distinction is undermined by the government's simultaneous concession that individuals are constitutionally entitled to practice their religions free from unwarranted government coercion. Id. at 22.

Coercion in this context can take many forms. Most often, perhaps, this Court's religion decisions have involved efforts by the government to compel religious behavior. E.g. Torcaso v. Watkins, 367 U.S. 488 (1961). It is no less coercive, however, for the government to prohibit the exercise of core religious practices.

Regrettably, the history of Native Americans is replete with examples of such government coercion, including nineteenth century prohibitions on ceremonial

dances,3/ the criminalization of peyote use,4/ and the prohibitions on taking of game necessary for Indian religious rituals.5/

None of these instances required Native Americans to act contrary to their religion; they were simply prohibited from practicing their religion. The same is true her. It is important to recognize, moreover, that prohibiting respondents from using the high country for religious purposes is comparable to barring

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3/ Department of the Interior, Regulations of the Indian Department 496-97 (1884).

4/ See e.g. People v. Woody, 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964). But see 21 C.F.R. §1707.31 (exempting religious users of peyote from federal drug laws).

5/ See Frank v. State, 604 P.2d 1068 (Alaska 1979).

Christians from partaking of the sacrament.[6]

As Justice Stewart once suggested, "a lonely soldier stationed at some faraway outpost could surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion." *Abington School Dist. v. Schempp*, 374 U.S. 203, 309 (1963)(Stewart, J., dissenting)(emphasis in original). Respondents' claim in this case is both simpler and stronger. They are not asking the government to support their religious practices but merely to allow those religious practices to continue.

The distinction petitioners offer between a government compulsion to act contrary to one's religious beliefs and a government impediment to acting in conformity with one's religious beliefs is, moreover, unworkable in practice. Like most affirmative/negative distinctions, it depends almost entirely on how the question is framed.

For example, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), can be described as a case in which Amish parents were required to send their children to school in violation of their beliefs or as a case in which Amish parents were barred from educating their children at home according to the dictates of their religion. Similarly, *Sherbert v. Verner*, 374 U.S. 398 (1963), can be described as a case in which plaintiff, a Seventh Day Adventist, was compelled to work on her sabbath or as a case in which she was barred from practicing the observance of her sabbath.

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[6] Interestingly, the 18th Amendment to the Constitution prohibited manufacture and sale of alcohol only for "beverage purposes."

The decision in *Sherbert* also refutes petitioners' secondary argument -- that whatever burden may be placed in this case on respondents' religious practices is only an indirect result of the government's land management policies and thus not cognizable under the free exercise clause. As this Court noted in *Sherbert*, government actions that impede religious practice are "invalid even though the burden may be characterized as being only indirect." 374 U.S. at 404. *See also Braunfield v. Braun*, 366 U.S. 599, 607 (1961).

Petitioners' reliance on *Bowen v. Roy*, 476 U.S. ___, 90 L.Ed.2d 735 (1986), is similarly misplaced. Although the Court concluded in *Bowen* that use of a Social Security number did not impermissibly burden plaintiffs' religious beliefs, the case is easily distinguishable on several grounds. Most important, there was no finding in *Bowen* that the use of a Social Security number would completely preclude the practice of plaintiffs' religion. Here, that critical finding was made by the district court, 565 F.Supp. at 594-95, and adopted by the Ninth Circuit, 795 F.2d at 693.

Second, the governmental system challenged in *Bowen* was in place for approximately fifty years before it was challenged. Thus, the plaintiffs in *Bowen* were attempting to alter the status quo -- a status quo that had long co-existed with their religion. Here, by contrast, respondents are seeking to preserve the status quo and to preserve their religious practices that depend on maintenance of existing conditions.

Third, Bowen involved "internal procedures" of the government in a way this case does not. 90 L.Ed.2d at 745. Management of public resources is a policy-making process, more like judgments about public education than judgments about "the size or color of the Government's filing cabinets. Id. Indeed, the notion that management of public property is an "internal" matter for the government, and therefore insulated from traditional First Amendment doctrine, is at odds with at least a half-century of this Court's jurisprudence. E.g. Cantwell v. Connecticut, 310 U.S. 296 (1940).

II. FREE EXERCISE CLAIMS INVOLVING PUBLIC LANDS SHOULD NOT BE ANALYZED UNDER THE REASONABLENESS STANDARD

In Wisconsin v. Yoder, 406 U.S. 205, 215 (1972), this Court stated: "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

Ignoring that well-settled principle, petitioners contend that respondents' free exercise claim should be analogized to a free speech claim involving a nonpublic forum, and hence should be resolved in favor of the government so long as the government has a "reasonable basis" for its decision.

In pressing this claim, petitioners are merely reformulating the argument advanced by Chief Justice Burger in Bowen v. Roy, supra. However, in Bowen itself, a majority of this Court rejected the effort to replace the strict scrutiny traditionally applied in free exercise cases with a diluted "reasonableness" test.

As Justice O'Connor observed in her concurring opinion:

> Such a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides. I would apply our long line of precedents to hold that the government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means.

90 L.Ed.2d at 762. Moreover, Justice O'Connor's views were adopted last Term by six Justices of this Court in Hobbie v.

Unemployment Appeals Comm'n, 480 U.S. ___, 94 L.Ed.2d 190, 198 (1987).[7]

The reason for this Court's extreme sensitivity to free exercise claims is its recognition that religion is a fundamental part of individual identity, and that the pursuit of spiritual fulfillment is integral to the lives of many individuals. As one commentator has stated, "[T]he cost to a principled individual of failing to do his moral duty is generally severe, in terms of supernatural sanction or the loss of moral self-respect." Clark, "Guidelines for the Free Exercise Clause," 83 Harv.L.Rev. 327, 337 (1969).

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[7] While this Court has indicated that it will be more deferential when restrictions on free exercise of religion arise in the military context Goldman v. Weinberger, 475 U.S. ___, 89 L.Ed.2d 478 (1986), it has refused to dilute the requirements for sustaining government regulations outside this "'specialized society separate from civilian society'" Id. at 483, quoting Parker v. Levy, 417 U.S. 733, 743 (1974).

The fact that respondents' free exercise claim involves government decisions about land management does not make this case equivalent to a free speech case involving a nonpublic forum, and hence reviewable under a "reasonableness" test.

In the first place, public parks represent a "quintessential" public forum that has traditionally been reserved for First Amendment activity. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Hague v. CIO, 307 U.S. 496 (1939). Petitioners recognize this principle but argue that the public forum doctrine only guarantees access, not the right actually to engage in any First Amendment activity. Petitioners' Brief at 40.

That proposition is refuted by its mere articulation. In every pubic forum

case this Court has ever decided, the issue was access to public property for the purpose of engaging in First Amendment activity. This Court has never suggested that access and speech (or in this case, access and religious practice) are severable First Amendment issues.

In a quintessential public forum, neither access nor the First Amendment activity for which access is sought may be barred absent a compelling state interest. See Widmar v. Vincent, 454 U.S. 263 (1981). Moreover, the same rules apply even if the park is regarded as a "limited" public forum to which respondents have historically been granted access to perform their religious rituals. Perry, 460 U.S. at 45.

It is true, of course, that government ownership of property does not guarantee a First Amendment right of access, United

States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114, 129 (1981). This Court, however, has never used the public forum doctrine to bar core First Amendment activity that cannot take place in any other location.

In *Perry*, for example, the union seeking access to teachers' mailboxes was able to communicate with the teachers via bulletin boards set aside for that purpose as well as by direct mail. Likewise, in *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1985), the non-profit groups denied participation in the Combined Federal Campaign could solicit donations from federal employees through other channels, including direct mail and in-person solicitation outside the workplace.

Here, respondents' religious practices are clearly site-specific and the site they have chosen is a traditional public forum. They cannot simply select another sacred land once a road is built. These unique circumstances support, rather than undermine, the need for strict judicial scrutiny.

Petitioners are plainly concerned that federal land management operations will be constrained if respondents are able to sustain their free exercise claim. Furthermore, they are concerned that the government will be required to sort through numerous challenges to its conduct to determine whether the challenges are based on a sincerely held religious commitment.

Similar concerns were raised and addressed in *Yoder*, *supra*, where the Court relied on the long history of organized religious practice by the Amish to buttress its decision to exempt Amish children from compulsory education laws. Likewise, in *Frank v. State*, 604 P.2d 1068, 1075 (Alaska 1979), a case analogous to the instant case because it too involved public resource management, the Alaska Supreme Court rejected the claim that allowing Indians to hunt moose without regard to the game laws would lead to an unmanageable line drawing problems.

Courts can and do draw reasonable lines in constitutional cases all the time. Of particular relevance, courts have been extraordinarily hesitant in finding that an individual or group's religious practices can only take place if public land is maintained in a particular condition. *See e.g. Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 (6th Cir.

1980), *cert. denied*, 449 U.S. 953 (1981). Courts have been especially reluctant to make such a finding where religious observances have continued after past alterations in the land. *See e.g. Wilson v. Block*, 708 F.2d 735 (D.C.Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984)(enlargement of ski area not found to violate free exercise clause where practice of religion continued after development of initial ski area).

In the instant case, however, it is plain from the record that respondents' religious practices cannot coexist with the contemplated road. This special circumstance compels a strong governmental showing before construction of the Chimney Rock section can be constitutionally justified.

If petitioners are correct that unfettered discretion to manage federal land is essential for the government to function, and the only way of promoting the government's wishes in this case is to construct the Chimney Rock section, then that interest will emerge and receive due consideration under a "compelling interest" standard. It does not require diluting the standard of review that this Court has consistently applied in free exercise cases.

On the present record, neither the district court, 565 F.Supp. at 595-97, nor the Ninth Circuit, 795 F.2d at 694-95, found the compelling interest test met. In reaching that conclusion, both courts appropriately stressed the absence of any showing by the government that its interest in land management could not be adequately served by a rerouted road. That

deficiency in the record is fatal to petitioners' case.

III. ENJOINING CONSTRUCTION OF THE CHIMNEY ROCK SECTION DOES NOT EFFECT AN ESTABLISHMENT OF RELIGION

Amici supporting petitioners, but not petitioners themselves, argue that a judicial order enjoining construction of the Chimney Rock section will violate the constitutional guarantee against establishment of religion. It is not surprising that petitioners themselves do not make this argument. There are numerous federal and state laws that recognize religion in order to accommodate free exercise.

If accepted, amici's argument would jeopardize the federal tax exemption for non-profit church property sustained in

Walz v. Tax Commission, 397 U.S. 664 (1970); the federal exemption from self-employment social security taxes for religious objectors (26 U.S.C. §1402(g)); the federal regulations exempting religious users of peyote from application of the drug laws (212 C.F.R. §1307.31); the federal statute exempting certain religious slaughtering of animals (7 U.S.C. §1902(b)); and the federal law that exempts religious objectors from military service (50 U.S.C. §456(d)). It would also call into question the American Indian Religious Freedom Act (42 U.S.C. §1996), which requires federal agencies to take account of impacts on Indian religious practices when making administrative decisions.

It is worthwhile noting that many of these laws have been involved in litigation in this Court, and nowhere has this Court suggested that there is a violation of the establishment clause. *See e.g. United States v. Lee*, 455 U.S. 252 (1982). Indeed, this Court's attitude toward laws and judicial decisions designed to preserve the free exercise of religion has been a tolerant one. As the Court stated in *Hobbie v. Unemployment Appeals Comm'n on Florida*, 94 L.Ed.2d at 200: "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."

One noted commentator has suggested that the appropriate standard for reconciling the establishment and free exercise clauses should be based on a distinction between "governmental actions arguably (even if not beyond doubt) compelled by the free exercise clause, and governmental actions supportive of religion in ways clearly not mandated by free exercise." L. Tribe, *American Constitutional Law* 822 (1978). Applying this analysis, actions "arguably compelled" by the free exercise clause would not be forbidden under the establishment clause. *See also* Choper, "The Religion Clauses of the First Amendment," 41 U.Pitt.L.Rev. 673, 691 (1980).

Even if one were to apply the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to the district court's injunction against the Chimney Rock section, the injunction would not violate the establishment clause. The first two parts of this test focus on the government's purpose and the effect of

government action, both of which must be primarily secular, not religious.

Contrary to the suggestion of *amici*, accommodating free exercise rights in a religiously neutral manner does not constitute an impermissible religious purpose nor does it impermissibly advance the cause of religion. In *Yoder*, decided just one year after *Lemon*, this Court had no trouble finding that a court decision exempting Amish children from the compulsory education laws did not violate the establishment clause. The Court there found that "the purpose and effect" of exempting the Amish was "not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the

Wisconsin compulsory education law would impose." *Yoder*, *supra* at 234 n.22.

Similarly, an injunction against the Chimney Rock section would be designed to permit respondents' age-old religion to survive free from the heavy impediment that the road would represent. Obviously enabling religious practice to continue without government interference is not an impermissible government purpose and does not produce an impermissible effect under the establishment clause.

The third component of the *Lemon* test focuses on whether the government's action would create "excessive entanglement" between government and religion. For example, last term in *Hobbie*, *supra*, this Court resolved the question whether allowing unemployment compensation to a person who quit his job for religious reasons would constitute an establishment clause violation by considering whether the accommodation would "entangle the State in an unlawful fostering of religion." 94 L.Ed.2d at 200. It found no such entanglement. *Id*.

Indeed, enjoining the Chimney Rock section produces less entanglement than petitioners' proposed alternative of building the road but monitoring its effects on Indian religious practices and seeking to mitigate those effects. Petitioners' alternative would involve the government in an ongoing assessment of religious needs and the competing needs of other forest users. By contrast, a decision to cancel or reroute the road is a one-time only event with no ongoing connection, either actual or symbolic, between the state and religion. *Cf*. *Tilton*

v. Richardson, 403 U.S. 672 (1971) (upholding one-time aid to church-related colleges for construction of buildings for secular instruction).

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

Respectfully submitted,

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Testimony Re: S. 1124

Before the Senate Select Committee on Indian Affairs

by Mahealani Ing, Executive Director

September 28, 1989

Good afternoon members of the Select Committee on Indian Affairs. Thank you for this opportunity to testify on Senate Bill 1124, which proposes a means to ensure that the management of Federal lands does not undermine and frustrate traditional Native American Religious practices. My written statement will be mailed from Hawaii at a later date, but with your permission, I would like to proceed with my oral testimony.

I would like to begin by briefly describing the context within which the Federal government claims jurisdiction over any Hawaiian lands. Briefly, less than 100 years ago, the U.S. government took almost two million acres of land from the Kingdom of Hawaii without any compensation to its native people. When Hawaii became a state, all but 400,000 acres were transferred to the state. The 400,000 acres retained by the federal government are today used for military bases and national parks. These are the lands over which the U.S. government claims federal jurisdiction, and which the native people want returned.

I am Mahealani Ing, Executive Director of a six-attorney public interest lawfirm called the Native Hawaiian Legal Corporation. Many members of the Select Committee staff are familiar with our work, which is to assert, protect and defend native Hawaiian rights to land, natural resources, and related entitlements. We have been regularly consulted by this committee on the American Indian Religious freedom act since prior to its enactment in 1978. One of our board members served on a national advisory committee which promoted this legislation at its inception.

In Hawaii, Native Hawaiian religious freedom claims initially have arisen in the context of access to sacred lands. In U.S. v. Mowat, 1978, several members of the Protect Kaho'olawe'Ohana were changed with trespassing upon Kaho'olawe island, contrary to federal statutes and regulations. Based on these regulations, entry onto Kaho'olawe was banned without advance consent by the Commandant of the 14th Naval District. Defendants claimed access based upon free exercise of religion. However the court in Mowat concluded that requiring advance approval before entry was not unreasonable as the island of Kaho'olawe was used as a target bombing area and might contain live unexploded ordnance which could put trespassers at risk. This risk outweighted any burden on free exercise of religion.

The case did not specify exactly what religious ceremonial activities were to be practiced on the island by defendants, but the religious, cultural, and historical significance to native Hawaiians of Kaho'olawe is similar to the claims made by Indians in Badoni and Sequoyah, two cases which dealt with Indian sacred lands. The court in Mowat found that the proper standard would be to balance the burden placed on defendant's free exercise of religion against the government's interests. the court concluded that "the compelling government interest ... in keeping outsiders off dangerous land ... outweighs any burden on defendants' free exercise of religion.

In the case of Aluli v. Brown, Kaho'olawe was again at issue. There the plaintiffs sought to stop the military from bombing the island to prevent further destruction of archaeological sites which had religious and historical significance to native Hawaiians. Although the Federal District Court denied the injunction, it held that the military was required to file annual environmental impact statements pursuant to the National Environmental Policy Act (NEPA). The court stated:

> "An action that significantly affects the quality of human environment is one that directly affects human beings through adverse impacts on the environment .... An EIS must consider the possible effects of major federal action upon historic and cultural resources. Eighty-nine archaeological sites have been discovered (so far) on Kaho'olawe which are of possible importance to Hawaiian history and culture. An adverse effect on the archaeological sites may have direct effect on human beings, e.g., plaintiffs. Defendants' bombing of Kaho'olawe is a major federal action significantly affecting the quality of the human environment."

While the court did not support the plaintiffs on their religious exercise claim, the court reminded the government that even archaeological sites are important to the welfare of human beings.

In Dedman v. Board of Land & Natural Resources, native Hawaiians challenged a Board of Land & Natural Resources (BLNR) decision permitting geothermal development in an area significant to native religious practitioners who honor the deity Pele.

The proposed development would impinge on the Pele practitioner's right to free religious exercise, since geothermal development requires drilling into the body of Pele and taking her energy and life blood.

The Hawaii Supreme Court first acknowledged the sincerity of the religious claims at issue. It then considered whether the BLNR's approval of the proposed geothermal development would unconstitutionally infringe upon native Hawaiian religious practice. On this question, the court found controlling the absence of proof that religious ceremonies were held in the area proposed for development. Without evidence of a burden on the free exercise of native religion, the court did not reach the compelling state interest question. Accordingly, the court concluded that no Free Exercise Clause violation had occurred.

The Dedman court's application of a narrow analysis of free exercise infringement accounted for its failure to find any burden on native Hawaiian religious practices. Under the court's view, a burden on the free exercise of religion exists when government action regulates or directly impinges on native Hawaiian religious practices. Furthermore, only government conduct which compelled irreverence of religious beliefs or penalized individuals for their religious actions would warrant free exercise protection.

Few practitioners of native religion can meet the standard. Such a constricted approach consigns free exercise protection to the far end of a rapidly diminishing spectrum of native rights.

The Free Exercise Clause of the First Amendment guarantees to native Hawaiians the freedom to practice their religion. To native Hawaiians, this means the freedom to practice a way of life involving a unique form of worship centered on a highly developed mythology and code of conduct. The scope of free exercise protection, however, depends on the court's interpretation of the Free Exercise Clause. Such interpretation has a long and varied history.

Originally, the Free Exercise Clause, as interpreted in Reynolds v. United States, only shielded religious belief from government interference. Subsequent cases Cherbert v. Verner and Wisconsin v. Yoder combined to incorporate religiously motivated conduct within the ambit of free exercise protection.

Those cases also established that government action which burdens religious freedom implicates free exercise protection. Both cases required the government to justify its conduct by demonstrating a compelling interest.

In a recent case which is viewed as having the most profound limitation of free exercise protection, Lyng v. Northwest Indian Cemetary Protective Association (1988), the Supreme Court severely limited the established precedents. Free Exercise Clause protection now requires infringment born of coercion or penalty on religious freedom. This case also rendered the American Indian Religious Freedom Act, originally designed to protect and preserve traditional native religions, less effective than Congress intended. The Supreme Court's recent pronouncements thus cast an unsettling specter of doubt upon the survival and continued practice of native Hawaiian religion.

The express purpose of the American Indian Religious Freedom Act was to require that federal policies comply with the constitutional mandate of free exercise of religion. Section 2 of the Act illustrates this purpose by instructing federal agencies to consult with native religious leaders concerning the changes in policies or practices necessary to preserve traditional religions.

Despite its Congressional directive to safeguard traditional religious practices, AIRFA has afforded little protection.

In Badoni v. Higginson, Navajos raised free exercise and AIRFA violations in the government's management of the Rainbow Bridge National Monument and the Glen Canyon Dam and Reservoir. The court found no legal basis for excluding the public from the sacred area and dispensed with the AIRFA claim with little discussion.

In Wilson v. Block where Navajos who performed religious ceremonies opposed expansion of a ski resort into their sacred area, the D.C. Circuit Court of Appeals stated that AIRFA did not require "native traditional religious considerations always to prevail to the exclusion of all else."

In Crow v. Gullet, where leaders of the Lakota and Tsistsistas Nations sought injunctive relief against state construction and development at Bear Butte, an important religious site used for various religious ceremonies including the Lakota's vision quest, the 8th Circuit Court of Appeals concluded that the state's action did not infringe upon Indian religious practices. Furthermore, the court found that AIRFA's provisions created no legal rights or cause of action independent of the first amendment. AIRFA has been a hollow shield for traditional native religions.

With all due respect, we do not believe the amendments proposed in Senate Bill 1124 will correct AIRFA's shortcomings.

For one thing, available exemptions are overbroad. I cannot think of one federal management decision which cannot be construed to be "necessary to carry out the legal responsibilities of the federal government," thus qualifying for an exemption.

The two remaining exemptions, protecting a governmental interest and protecting a vested property right, are already strongly supported by the Free Exercise Clause and the cases which interpret it. Frankly, these amendments would appear to exacerbate the problem rather than correct it.

Further, language which suggests that the federal agency attempt to accommodate various competing interests and pick the course of action least intrusive somehow does not have the ring of first amendment constitutional rights to it. The lofty and paramount constitutional right to fully exercise one's religion is relegated to some base type of political expedient. This is unacceptable.

Lastly, I have participated, as a native Hawaiian, in religious services at Volcanoes National Park, to honor Tutu Pele, our fire goddess. Myself and other native Hawaiians have had to endure gawking, insensitive tourists and park personnel. There is not time when one can go there and privately conduct religious ceremonies. Therefore, I believe access to the general public should be severely restricted, if not cut off entirely.

For these reasons, we do not support S.B.1124. Thank you for the opportunity to present testimony.

TESTIMONY OF
REID PEYTON CHAMBERS

Before the
SENATE SELECT COMMITTEE
ON INDIAN AFFAIRS

Re: S. 1124

September 28, 1989

Mr. Chairman and members of the Committee, my name is Reid Peyton Chambers. I am a partner in Sonosky, Chambers and Sachse, 1250 Eye Street, N.W., Washington, D.C. 20005, a law firm representing Indian tribes and tribal organizations. I am honored to appear before the Committee today to give testimony in support of S. 1124. My testimony will consider the constitutionality of this legislation from two perspectives - first, the constitutional power of Congress over Indian affairs and, second, the law respecting the establishment of religion.

Modern court decisions have tested the constitutionality of acts of Congress in Indian affairs by whether they "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians."1/ That unique obligation or trust responsibility is deeply rooted in the Nation's history. I believe that S. 1124 is tied rationally to this trust responsibility, and that the trust responsibility to Indians furnishes the requisite "secular purpose" and effect necessary for the legislation to survive a challenge under the Establishment Clause of the First Amendment.

The United States Supreme Court first discussed the Government's trust obligation toward Indians in Chief Justice John Marshall's early decisions dealing with the Cherokee

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1/ Morton v. Mancari, 417 U.S. 535, 555 (1974); Delaware Business Committee v. Weeks, 430 U.S. 73 (1977).

Nation.[2] In the Cherokee cases, the Court held that Georgia's laws had no force and effect in Cherokee territory because the Cherokee Nation was "distinct political society." Speaking for the Court, Chief Justice Marshall stated that "the condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . . , marked by peculiar and cardinal distinctions which exist no where else." While Chief Justice Marshall held that Indian tribes are not independent foreign nations, he concluded that they "may, more correctly, perhaps, be denominated domestic dependent nations." Their "relation to the United States resembles that of a ward to his guardian," the Chief Justice stated.

Later cases treat this trust responsibility as a source of congressional power over Indian affairs, implicit in either the Constitution itself or the treaties and agreements with Indian tribes.[3] Cases have described Congress' power over Indian affairs as "plenary."[4] While this congressional authority is of course not absolute and has been held "subject to pertinent constitutional restrictions,"[5] Congress' power to implement its trust responsibility to Indians is certainly very extensive. It is grounded in the Indian commerce clause, in the treaty power and historically in other portions of the Constitution, such as the public property clause.

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[2] Worcester v. Georgia, 31 U.S. (5 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

[3] E.g., United States v. Kagama, 118 U.S. 375 (1886).

[4] E.g., Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-84 (1977); Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899).

[5] E.g., Hodel v. Irving, 481 U.S. 704 (1987); Shoshone Tribe v. United States, 299 U.S. 476 (1937); United States v. Creek Nation, 295 U.S. 103, 109-110 (1935).

In the 150 plus years since Chief Justice Marshall wrote, most cases elucidating the trust responsibility have dealt with property rights held in trust for Indians by the United States -- chiefly rights to land, rights to use of water,6/ rights to mineral resources,7/ rights to timber8/ and rights to hunt and to fish.9/ The trust responsibility is, however, broader than protecting just property owned by Indians today. As Chief Justice Marshall explained, its underlying purpose is to protect the tribes' existence as distinct political societies.10/

6/ E.g., Arizona v. California, 373 U.S. 546, 599-601 (1963).

7/ E.g., Navajo Tribe v. United States, 364 F.2d 320, 322-324 (Ct. Cl. 1966).

8/ E.g., United States v. Mitchell, 463 U.S. 206 (1983); Squire v. Capoeman, 351 U.S. 1 (1956).

9/ Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979).

10/ Thus, one result of the trust responsibility is a government-to-government relationship between tribes and the United States whereby the United States protects the authority of Indian tribes to "make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 220 (1959). For this reason, courts have held that the tribes' rights to self-government are inherently protected by federal law, even without specific federal statutes so stating, and have held that state laws that would interfere with tribal self-government are for that reason alone preempted because they conflict with overriding federal law and policy. E.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

Tribes are entire societies, not simply private, voluntary or social organizations.[11] For many tribes, Indian religion is an inseparable part of their culture and society. Thus, the right of Indian tribes to practice their culture and religion is a part of their federally protected right to maintain a distinct political society, which the trust responsibility shelters.

The protection of Indian culture and religion outside of lands to which Indians hold title as proposed by S. 1124 seems well within the unique obligations of Congress to American Indians, and rationally tied to the objective of nourishing Indian tribes as distinct political societies. Congress could of course, as part of its constitutional power, designate new Indian reservations.[12] It could set aside religious sites now on public lands as part of those reservations for the exclusive use and occupancy of particular tribes practicing religious observances at those sites. Congress has, indeed, frequently included religious sites within Indian reservations; the restoration of Blue Lake national forest lands to the Taos Pueblo[13] is a recent example of such congressional action. A fortiori, it follows that Congress can take the lesser step of providing for non-exclusive Indian uses of religious sites.

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[11] Compare United States v. Mazuire, 419 U.S. 544, 557 (1975).

[12] E.g., United States v. John, 437 U.S. 634 (1978).

[13] Act of December 15, 1970, 84 Stat. 1437, see S. Rep. No. 91-1345 (1970).

I do not believe this sort of congressional action violates the Establishment Clause of the First Amendment. It is clear that S. 1124 does not affirmatively aid or support Indian religions. No financial assistance is provided to Indian religious practices.

The central command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.[14/] Indian religions are not preferred in any way over others by S. 1124. The problem S. 1124 addresses is that government uses of the public lands and other public resources impact on Indian religious practices in a dramatically different way from practices of other religious denominations. This is because, as the bill findings state, many Indian religions are site-specific. These religions view man, nature and deity as an integral whole, and focus on spiritual renewal through an individual's relationship with particular holy places. If those holy places are altered by development, the religious experience is imperiled. Indian religions are burdened and indeed threatened by federal government actions on the public lands and forests in ways that other religions are not.

14/ Larson v. Valente, 456 U.S. 228, 244 (1982); Zorach v. Clauson, 343, U.S. 306, 314 (1952) ("government must be neutral when it comes to competition between sects.").

By enacting S. 1124, Congress would simply accommodate the programs and operations of the United States on public lands to the religious needs and interests of Indian people, their culture and society. This would allow the Indians the same rights to exercise their religions that other Americans enjoy. The government would not be aiding Indian religion or endorsing any particular religion; it would simply abstain from interfering with Indian religious practices unless it has a compelling reason for doing so. Religious autonomy, the central purpose of the First Amendment, would accordingly be furthered by enactment of S. 1124.

Analysis of the legal criteria that have been developed by the Supreme Court in establishment cases confirms this conclusion. The Court has stated that:

> Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its primary effect must be one that neither advances nor inhibits religion ...; finally, the statute must not foster 'an excessive government entanglement with religion.'[15]

I have already discussed the second standard: I believe it is clear that S. 1124 does not assist or inhibit religion but merely protects it from interference by government activities that uniquely burden Indian religious practices. Similarly, I believe the bill advances the secular legislative purpose and has the effect of protecting the distinct political Indian societies of which religious practices are but a part.

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[15] Lemon v. Kurtzman, 403 U.S. 602, 612-613. (Citations omitted.)

While the concept of S. 1124 does not in my view excessively entangle government with religion, I am concerned that the bill as drafted may unduly enmesh Indian religious practices in administrative regulation. I am concerned that federal agency inquiries into matters such as whether a particular site is "indispensable" to an Indian religion, or whether an Indian religion is "traditional," could impermissibly "entangle" government with religion. For this reason, I urge the Committee to reexamine the bill and consider simplifying its standards. In my view, it should be sufficient to invoke the bill's protection if a tribe or Indian religious group certifies that a particular site is central to its religion, and the agency determines that the certification is sincere and genuinely held. No further administrative inquiry should be permitted, and the agencies to should defer to certifications by bona fide Indian religious groups.

Thank you for inviting me to appear before you today. I would be pleased to answer any questions you may have, or to help in any other way I can to assist in enactment of this important bill.

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October 13, 1989

BY MESSENGER

Honorable John McCain
United States Senator
United States Senate
Select Committee on Indian Affairs
Washington, D.C. 20510-6420

Dear Senator McCain:

Thank you for your October 2 letter submitting additional questions to me concerning S. 1124.

I shall first respond to Questions 1 and 4 (together). Questions 1 and 4. In the current administrative process how much deference is given by federal agencies to tribal claims regarding the threat posed to the religion, and the character and location of the area affected by the sacred site? Apart from the administrative consultative process, what avenues, in your experience, are available for Native American religious leaders seeking to protect their rights to access to religious sites, given the Lyng decision?

Response. My actual experience with the agencies on the problem since the Lyng case is limited, but my clear impression is that the only avenue open to Indians is the internal administrative process, and that federal agencies give relatively little weight to Indian religious values. I know, for example, of no project that has been cancelled or materially altered as a result of pressure from tribes or Indians over religious practices in the past two years.

Question 2. How do you address the problems of a constitutional challenge of S.1124 under the Equal Protection clause claiming that this is an impermissible preference of one religion, i.e. Native American religion, over other types of religion?

Response: The Establishment Clause was designed to prevent the imposition of the religious values of a dominant sect on a minority, or the use of public funds to support a particular religion, but not others. Obviously, no such danger is posed by S. 1124. Indian religions are not positively supported over others by the bill.

In fact, the bill takes no positive steps at all to assist or encourage any religious practice. The bill is passive, not active. It merely directs the Government to abstain from certain actions that imperil the practice and even the existence of Indian religions.

Even so, one might conceivably argue that a legislative action that directs the government not to interfere with Religion A but fails to protect Religion B runs afoul of the Establishment or Equal Protection Clauses. Clearly, however, S 1124 does no such thing. It protects all Indian religions from threats that are unique to them and are not posed to western type religious practices. Simply put, government uses of public lands impact on Indian religions in a way they do not on other religions. Unlike western religions, most Indian religions are site-specific. A particular site is holy, and religious practices must take place there. A high value is placed on the interrelationship of man and that particular natural site. Indian religions are thus burdened and threatened by federal actions on public lands and in public forests in ways other religions are not. Without S. 1124, Indian religions are actually disfavored as against other religions.

Question 3. How would you respond to Governor Matheson's assertions that S. 1124 would fail the Lemon vs. Kurtzman test because there is no secular purpose?

Response: The "secular purpose" of the bill is to protect Indian tribes as distinct political societies. A society includes culture and that can include religious practices. The United States' trust responsibility exists to protect that Indian culture and society. This, indeed, is its central purpose. Indian lands and other property rights are protected so that the society may persevere, not as ends in themselves. This is why we have Indian reservations.

As part of its power in Indian affairs, Congress could unquestionably set aside certain religious sites as part of Indian reservations, for exclusive Indian use. It has done so in the past, by treaty and otherwise, and could do so now. An historic example is non-exclusive access by the Sioux to the pipestone quarries, Treaty of April 19, 1858, 11 Stat. 743; Act of February 16, 1891, 26 Stat. 764; see Yankton Sioux Tribe v. United States, 272 U.S. 351, 356-357 (1926). A more modern example is the restoration of Blue Lake national forest lands to the Taos Pueblo. Act of December 15, 1970, 84 Stat. 1437, see S. Rep. No. 91-1345 (1970).

S. 1124 merely takes the lesser step of protecting non-exclusive Indian use of sites outside existing reservations on lands still in public ownership. This is rationally tied to Congress' unique obligations to Indians.

Question 5. How would you address the problem raised in the hearing, i.e. that S. 1124 presents an unconstitutional "federal entanglement" by requiring federal agencies to make certain administrative determinations regarding religious practices?

Response: As I set forth in my testimony and written statement, I am concerned that S. 1124 does overinvolve federal agencies in decisions about religion. For that reason, I prefer a simpler policy--that once a tribe or Indian religious group makes a sincere and good faith certification that a particular land use imperils its religious practices, the use should cease unless it is justified by a particular statute directing it or the agency can show a compelling justification for its use of the lands. The agency should not become embroiled in deciding whether a particular use is "indispensable" to the religion or the religion is "traditional."

This would not in my view give Indians a "veto" over all federal land uses. The compelling interest test is a balancing standard, with the burden of proof on the agency. Many federal actions would satisfy the standard. Even if they did not, Congress could by statute authorize the federal land use even over Indian religious objections.

Questions 6 and 7 (together). How does the administrative process change under S. 1124 from the process currently used to evaluate a Federal land management decision impacting Native Religious sites? Do you feel that there is enough similarity between the Federal agencies, such as BLM, the Forest Service and the Park Service to warrant the development of uniform regulations and administrative process to ensure the protection of Native American religions and religious practices?

Response: I think the federal agencies involved should have uniform practices for deferring to Indian religious uses.

And I think the bill if enacted would force the land management agencies to respect Indian religious uses and practices in ways that they do not today. The G-O road is a dramatic but typical example. There was clearly and concededly no compelling justification for the road. It was justified under the so-called "multiple use" concept. These kinds of decisions are made daily in the Park Service, the Corps of Engineers, the Bureaus of Reclamation and Land Management and like agencies. The bill would greatly enhance the protection of Indian religious values by forcing these agencies to abstain from this kind of non-essential uses of land that interfere with Indian religious sites.

Conclusion

Again, Senator, thank you for the honor of being invited to appear before the Committee, and also for your leadership on this question of such vital importance to Indian people. I both commend your great courage in supporting this bill against powerful mineral, timber and other development interests that favor widespread use of the public lands, forests and other resources, and hope for the prompt enactment of this curative legislation

Kind personal regards.

Sincerely,

Reid Peyton Chambers

RPC:bnm

THE CONFEDERATED SALISH AND KOOTENAI TRIBES
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TESTIMONY OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION BEFORE THE UNITED STATES SENATE SELECT COMMITTEE ON INDIAN AFFAIRS ON S. 1124

A BILL TO AMEND THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT OF 1978

SEPTEMBER 28, 1989

Mr. Chairman and distinguished members of this Committee:

The Confederated Salish and Kootenai Tribes of the Flathead Nation appreciate the opportunity to provide testimony to this Committee on S. 1124. This bill seeks to amend the American Indian Religious Freedom Act of 1978. The action by Congress in 1978, in passing the Act originally, was and is viewed by the Tribes of the Flathead Nation as a very positive manifestation of Congress' recognition of the unique and profoundly important need for Tribal access to sacred religious sites on federal lands. Unlike other religions, Native American do not erect edifices to manifest their respect for the creator, rather they are drawn and directed to specific natural surroundings because of the spirituality of those special places where they live to practice their religion. Other religions in the United States choose to practice their religion in a different fashion, this shows the religious cultural diversity which exists throughout this country. As the first citizens of this land, on which we now all live on together, we only ask and feel it is our right to ask that our religious practices be respected and not prohibited. This country as you are aware has a history of prohibiting Indians from practicing their religions. For example, Indians were prevented for sometime from holding ghost dances, sundances, and as well, medicine bundles were destroyed or confiscated by representatives of the Federal Government. The passage of the American Indian Religious Freedom Act signaled a new era of Congressional policy and understanding of Indian religious practices.

The effectiveness, however, of the 1978 Act which recognized this unique aspect was stripped away completely in April of 1988 when the United States Supreme Court issued its decision on Tribal religious practices in Lyng v. Northwest Indian Cemetary Protective Association. The Court held that under the free exercise clause of the Constitution, the Federal government could not be prevented from destroying sacred sites of traditional Native American religions. The court, further held that the American Indian Religious Freedom Act did not create any enforceable legal right. Prior to this decision the Tribes were able to have federal agencies, responsible for managing federal lands, to take into consideration, albeit grudgingly, Native American religious concerns. However, since the decision of the Court, the attitude of personnel in the field who work for those land management agencies has been to press forward with their management decisions at the expense of sacred Tribal religious sites and artifact areas. For example, the Tribes have had and continue to have a particularly difficult time with the Corps of Engineers and to some extent with the Forest Service on Lake Kookanusa in northwestern Montana. The Lake is in an area of aboriginal land of the Kootenai Tribes. The Corps, with Forest Service appropriated funds, had constructed boat access ramps without adequate surveys or controls as to the impacts on Kootenai archeological and religious sites. This construction has led to direct damage and destruction of these sites. Unless Congress takes action to pass this bill, the attitude of ambivalence exhibited by the federal land managers will go unchecked. In addition, without national legislation, each land management region is free to set its own policy guidelines, which results in inconsistency of approach and also to conflicting policy. This leads to frustration and anger among our Tribal people who are trying to practice their religion.

The political decision of this very conservative United States Supreme Court in Lyng v. Northwest Cemetery Protective Association, prohibiting and allowing for the destruction of sacred Indian religious sites, has set Federal Indian Policy back to the time of President Andrew Jackson. A period when the Supreme Court issued decisions supportive of protecting Indian rights, only to have those decisions thwarted by the political policies of Andrew Jackson. Those policies, among other problems for Indians, produced the infamous "Trail of Tears" for the Cherokee people. Congressional legislation is necessary today to reverse this present dangerous policy shift by the Supreme Court.

Turning now to the bill itself with respect to particular provisions we offer the following comments. The bill as drafted first of all provides for the threshold requirement that a site must be considered to be historically sacred and indispensable by a "traditional" Native American religion. Presumably the bill envisions that most Tribal religious practices will be presumed to be "traditional" so that a Tribe can then qualify, to the satisfaction of the responsible federal agency, that a particular site is sacred from an historical perspective and is indispensible to the Tribal religion. In the absence of such a presumption of "traditional", the difficulty we have with this first part is that who within the particular land management agency would be qualified to make such a call, that a given Tribal religion or practice is traditional.

The burden under the bill then continues to rest on the Indian religion to demonstrate that the site is indispensable and has historically been regarded as sacred. It needs to be emphasized that Indian people are strongly committed to protecting site-specific areas for the practice of their religion-large geographic areas are not affected, contrary to the testimony of federal land managers. The obligation of meeting these requirements would probably have to be done through Tribal religious leaders and to some minor extent by anthropologists. We emphasize the minor role that anthropologists should be given in this area, simply because Indian practitioners of traditional religion have deliberately not shared with anthropologists much of their religious practices or locations of sacred sites.

Once this threshold requirement is met the burden under the draft bill then shifts to the federal agency to demonstrate that its management decision is based on not less than one of three principles. The first of these is the fulfillment of carrying out the legal responsibilities of the Federal government. This particular language couldn't possibly be any broader in scope. It provides no standard whatsoever, whereby the federal action could be measured. The "legal responsibilities" language needs, obviously, to be refined.

Of the other two principles the one which requires the protection. of a vested property right is likewise without any tangible definition. Whose vested property right is being protected and secondly what kind of property right is being protected?

Lastly, and no less important, the Federal agency has the burden of showing that its decision is the least intrusive. This is the only real part of the bill that offers some modicum of protection for Indian religious practices. While it does continue to allow for the federal manager to follow a particular course of conduct and not prohibit it, it does allow for the Tribes to challenge that action if it is not the least intrusive course which should be followed.

We thank you for the opportunity to comment on the bill and to offer our support for its enactment, if the ambiguous language is adequately changed.

THE NAVAJO NATION

LEONARD HASKIE
INTERIM CHAIRMAN
THE NAVAJO TRIBAL COUNCIL

IRVING BILLY
INTERIM VICE CHAIRMAN
THE NAVAJO TRIBAL COUNCIL

AMERICAN INDIAN RELIGIOUS FREEDOM ACT AMENDMENTS OF 1978

S. 1124

TESTIMONY OF PERCY DEAL, HARDROCK CHAPTER DELEGATE

NAVAJO TRIBAL COUNCIL

BEFORE THE

SENATE SELECT COMMITTEE ON INDIAN AFFAIRS

WASHINGTON, D.C.

SEPTEMBER 28, 1989

Mr. Chairman and Honorable Committee Members, thank you for the opportunity you have given me to submit comments regarding S. 1124. As a Navajo Tribal Council Delegate representing Hardrock Chapter of the Navajo Nation, I support the proposed legislation which would "put some teeth" into the American Indian Religious Freedom Act. I am grateful to Congress, and especially Senator McCain and Representative Udall, for their recognition of our religion and their understanding of the special nature of our religious practices.

It must be understood that the loss or destruction of our religious sites through the actions of federal agencies is equivalent to a law preventing Christians or Jews from attending churches or synagogues. This is an apt parallel. Our land is our religion. The ways we worship, our ceremonies must be carried out not only in specific ways, but in exactly the right place. What I am saying is that Navajo religion, like probably most traditional Native American religion, must be correct as to location as well as procedure. It would be at least useless, if not sacrilegious, for us to carry out our ceremonies in an inappropriate place. When the federal government takes actions which deny us the use of certain places, or the right to perform certain acts in these places, it effectively takes away freedom of religion.

Post Office Box 308 • Window Rock, Navajo Nation (Arizona) 86515 • (602) 871-4941

I would like to note in passing that we are facing religious freedom issues on our reservation. We are attempting to work with the Hopi Tribe to assure them their right to continue gathering young eagles which are part of certain very sacred ceremonies of the Hopi people. As in your legislation, we are attempting to balance the right of traditional Hopi people to gather these eagles, with the rights of Navajos who live on the lands the Hopi must cross to get them. We are also concerned, as are the Hopi, that the taking of eagles not lead to a decline in their population. Finally, we are concerned that religious freedom be a two-way street, that the Hopi Tribe respect the needs of traditional Navajos to gather certain materials, to freely use certain sites, and to build certain temporary structures for religious purposes.

Finally, I would like to comment once more on a federal program which effectively denies Navajo people their religious freedom, as surely as any of the federal actions which are addressed by the proposed legislation. This is the federal Relocation Program, which is being carried out under Public Law 95-531 as amended. This is not a voluntary program. It is part of a federal effort to coerce people into leaving their land. I want to repeat what I said to Congress this spring:

> Relocation has no place in the traditional Navajo world. Suppose, you who are Christians, that there were only certain places where Jesus could hear your prayers or help you, and that anywhere else you were at the mercy of Satan. Suppose that, for no fault of your own, someone were to expel you from the lands where you were safe and tell you that you could never go back to the place where your prayers could be heard. Suppose they also made you leave behind your Bibles and all the other things you use in your worship. And suppose you were left in a terrible place where Jesus and God could never hear you again or save your soul. If you can imagine these things, you can imagine what relocation means to traditional Navajos.

I respectfully submit to you, now that you are considering the religious needs of Native American people, that you apply your concern and insight to the problems of Navajo people who are facing relocation. We fell that a constructive resolution of this problem is possible. In a few months, we will offer our suggestions to this Congress. I ask you today to remember in your hearts why you are considering the proposed amendments to the American Indian Religious Freedom Act, and act consistent with those reasons.

In conclusion, I am delighted that this Committee is addressing the issue of Native American religious freedom. I know that all the people I represent support you in your effort to protect our right to practice our religion.

STATEMENT BY THE PUBLIC LANDS COUNCIL, NATIONAL CATTLEMEN'S ASSOCIATION, AMERICAN SHEEP INDUSTRY ASSOCIATION AND ASSOCIATION OF NATIONAL GRASSLANDS BEFORE THE SELECT COMMITTEE ON INDIAN AFFAIRS, UNITED STATES SENATE, ON S.1124, A BILL "TO PROVIDE A MEANS TO ENSURE THAT THE MANAGEMENT OF FEDERAL LANDS DOES NOT UNDERMINE AND FRUSTRATE TRADITIONAL NATIVE AMERICAN RELIGIOUS PRACTICES".

The Public Lands Council, National Cattlemen's Association, American Sheep Industry Association, and Association of National Grasslands appreciate this opportunity to comment on S.1124, the American Indian Religious Freedom Act Amendment of 1989, introduced by Senator John McCain.

The livestock industry strongly supports every individual's right to exercise his or her religion. This bill, however, goes far beyond that right, which is already guaranteed under existing law.

If enacted, this legislation would give Native American enormous power, and in effect veto power, over public land management and use. It would essentially allow Native Americans to block other uses of the public lands such as livestock grazing, mining, timbering, water development, wildlife management, recreation, or any other use that would pose a "threat of undermining and frustrating" any traditional Indian religious practice. The effects are unknown but potentially enormous. The language specifying which federal lands would be affected by this bill is extremely vague. No one knows how many religious sites exist, where or how large they are, how much land would or could be affected, or what other activities could be affected.

It appears the basic premise of the bill is that Native American religious use of federal land should be the primary use of those lands. This flies in the face of numerous laws that direct that our national forests, BLM lands,
national parks, wildlife refuges, military lands, and other federal lands totaling

some 724 million acres, or one-third of the land in this nation, shall be managed for a wide variety of important uses as determined through the land use planning process or as directed by Congress.

The American Indian Religious Freedom Act already requires the federal government to protect and preserve Native American religious rights and practices. The Supreme Court ruled in Lyng vs. Northwest Indians Cemetery Protective Association that this law does not create any legal rights that can be enforce against federal agencies. The court said that Indian rights "do not divest the government of its right to use what is, after all, its land."

In addition, his bill would grant Native Americans preferential treatment for one particular type of religion and therefore violates the Establishment Clause of the First Amendment. It also bypasses any kind of administrative relief in case of problems, and instead authorizes direct court review.

For all of the above reasons, the public lands livestock industry strongly opposes this legislation.

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The Public Lands Council represents the 27,000 ranchers who graze cattle and sheep on federal lands in 14 western states, and coordinates the public land policies of the National Cattlemen's Association, American Sheep Industry Association, and the Association of National Grasslands. The National Cattlemen's Association is a non-profit trade association representing approximately 230,000 professional cattlemen throughout the nation, including individual members, 48 affiliated state cattle associations, and 23 affiliated national breed organizations. The American Sheep Industry Association represents the nation's 113,000 lamb and wool producers, including 38 state organizations, associated organizations and companies, and individual members. The Association of National Grasslands represents approximately 4,000 ranch families who graze livestock on National Grasslands in North Dakota, South Dakota, Wyoming, Colorado, and Nebraska.

TESTIMONY OF GENEVA TOP SKY STUMP, OF ROCKY BOY AGENCY, ROCKY BOY'S INDIAN RESERVATION, MONTANA
REPRESENTING THE ORIGINAL CHIPPEWA CREE,
THE TRADITIONAL RELIGIOUS GOVERNMENT
AT THE ROCKY BOY'S RESERVATION

ON S. 1124 AND H.R. 1546, A BILL TO AMEND
THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT OF 1978
BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
SEPTEMBER 28, 1989

A. INTRODUCTION

Mr. Chairman and members of the Committee, I am indeed honored to submit written testimony on S. 1124, and H.R. 1546, which are bills to amend the American Indian Religious Freedom Act of 1978, Pub. L.95-341, 42 U.S.C. Sec.1996 (AIRFA). The Original Chippewa Cree wishes to extend it's profound appreciation to Congressman Udall for introducing the original AIRFA and H.R.1546.

The Original Chippewa Cree is the political arm of the traditional religious government on the Rocky Boy Indian Reservation which conducts it's affairs without regard for the illegally imposed BIA government and under the authority of the 1855 Steven's Treaty which was signed on behalf of the Cree Indians by Chief Broken Arm, whose many descendants today comprise the traditional government, and who have never surrendered or signed away their lands guaranteed under that treaty and by right of aboriginal occupation. Those lands include the sacred Sweet Grass Hills, in northern Montana.

The Original Chippewa Cree is fighting to preserve certain religious sites in the Sweet Grass Hills which they have used for many centuries and which are threatened by proposed Gold mining.

B. SUMMARY OF MAJOR POINTS

1. The Original Chippewa Cree in general adopt the position of the Native American Rights Fund, as submitted by Steven C. Moore on June 18, 1989, on the need to strengthen AIRFA to restore a fair balance between Native religions and the decisions

of the federal land management agencies which threaten their very survival.

2. The Original Chippewa Cree would add to that a proposal that an automatic stay is necessary to protect the sites while an administrative appeal is attempted to invoke the provisions of AIRFA. Presently there is no way to provide for a stay in an administrative appeal of a Bureau of Land Management decision to allow mining of Holy Sites. Neither the State Manager or the Board of Appeals are authorized to grant a stay to a decision to allow mining, and when a decision is rendered on an appeal several years later, the object of the appeal usually has been destroyed. Only if AIRFA contains a provision for an automatic stay, not withstanding any other law, will it provide an opportunity for poor Indian groups and traditional elders to protest the actions of the BLM. These groups almost always lack the money and organization to go into Federal Court to stop the actions of the Federal Government.

C. THE NEED FOR A STAY

1. The History of the Original Chippewa Cree Case.

The initial litigation concerning the Sweet Grass Hills is summarized in THE BLACKFOOT TRIBE, 103 IBLA 228 (July 26, 1988). In that case the Original Chippewa Cree were not even notified of the proposed action, and the first that our supporters knew of the mining was when they were run out of the affected area by the Mining Company involved. A proposal was made by Santa Fe Mining, Inc. for a considerable amount of road work and drilling which would dramatically affect the major areas of East Butte.

In that case a Notice of Intent was filed on October 7, 1985. An on site visit was made by a Blackfoot Delegation on June 19, 1986. A letter of recommendation was sent on June 23, 1986 recommending approval over the Black Foot Objections. On June 30, 1986, the BLM approved the mining exploration. The Tribe moved for a stay at the time that it filed it's Notice of Appeal and was informed that the Area Director could not issue a Stay. The appeal was made within 30 days of the decision and the "Statement of Reasons" filed shortly thereafter. After the Mining Company and the BLM filed Briefs the matter was decided on July 26, 1988, by the Board of Land Appeals. The decision, because no stay was issued, was almost two years after the appeal, and almost two years after a large number of religious sites were destroyed by the exploration activity. The absence of any sort of provision for a stay meant, in effect, that any religious sites were open to development without any recourse for the Native Americans involved.

The current litigation is Appeal of the Original Chippewa Cree, IBLA 89-561. The District Managers Decision was made on June 20, 1989. The Original Chippewa Cree were not served with a copy of the decision but had to locate one in the local library. They filed a Notice of Appeal on July 14, 1989 and requested an immediate Stay. The Original Chippewa Cree were informed on July 18, 1989 that the BLM District Office lacked jurisdiction for a Stay and suggested a request for immediate stay be directed to the Board of Land Appeals. A Request for Immediate Stay was then filed with the Board on July 19, 1989. The BLM appeared on August 3, 1989 and argued that there was also no jurisdiction or authority for the Board of Land Appeals to grant a stay. The OCC filed a response to the government motion in mid August 1989. On September 1, 1989 the Original Chippewa Cree filed it's Statement of Reasons. In ordinary course the BLM and the Mining Company will file briefs and a decision will occur in about two years. The mining exploration was actually completed by the time that the Statement of Exceptions was filed.

In both the Blackfoot Tribe, supra and the Original Chippewa Cree, supra the lack of a stay, in any administrative forum, makes the AIRFA completely a dead issue on appeal, and allows the total and irreversible destruction of the religious sites before any sort of review can occur.

2. A discussion of the law in this case is contained in the Government's Motion And Response to Appellant's Request For Immediate Stay of August 3, 1989.

"Under 43 CFR Sec. 3809.4(f), '[a]ny party, other then the operator, aggrieved by a decision of the authorized officer shall utilize the appeals procedure in [43 CFR Part 4]. The filing of such an appeal shall not stop the authorized officer's decision from being effective.' Nothing in the regulations provides that a party, other than an operator, may request a stay. Cf. 43 CFR Sec. 3809 4(b) ('A decision of the authorized officer from which an appeal is taken to the State Director shall be effective during the pendency of an appeal. A request for a stay may accompany the appeal.'). Thus, while the regulations provide that an operator may request that the State Director issue a stay, the regulations are silent concerning a request for a stay when a third party appeals a decision to the Interior Board of land Appeals. Absent authority to request a stay, appellant's motion should be denied."

Indeed, the action that the OCC is asking the committee to take is to provide for the automatic stay that is missing from the BLM regulations, and which is necessary if even the present AIRFA statute is to have any meaning at all.

D. CONCLUSION

While the OCC have other specific ideas, the two major points it wishes to raise are the need for a stay and the need for some balance so that Indian issues are not just swept under the rug. We hope that we are invited for future hearings so that we can appear in person, and that the Committee can hold hearings on this issue in Montana so that our elders can attend and tell their story. Thank you for this opportunity to share our views with the Committee.

TESTIMONY OF ALVIN WINDY BOY, OF ROCKY BOY AGENCY, ROCKY BOY'S INDIAN RESERVATION, MONTANA A MEMBER OF THE BUSINESS COMMITTEE OF THE CHIPPEWA CREE TRIBE OF THE ROCKY BOY INDIAN RESERVATION, MONTANA, AND ON BEHALF OF THE CHIPPEWA CREE TRIBE

ON S. 1124 AND H.R. 1546, A BILL TO AMEND
THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT OF 1978
BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
SEPTEMBER 28, 1989

A. INTRODUCTION

Mr. Chairman and members of the Committee, I am indeed honored to testify before you today on S. 1124, and H.R. 1546, which are bills to amend the American Indian Religious Freedom Act of 1978, Pub.L. 95-341, 42 U.S.C. Sec.1996 (AIRFA). The Chippewa Cree Tribe wishes to extend it's profound appreciation to Congressman Udall for introducing the original AIRFA and H.R.1546.

The Chippewa Cree Tribe of the Rocky Boy Reservation, Montana is a group of Indians organized in the late 1930's under the Wheeler-Howard Indian Reorganization Act (IRA). It represents about 5,000 members, most of whom live on the Rocky Boy Indian Reservation. The Rocky Boy Indian Reservation is one of the smallest and poorest in the country, with an annual income of about $2,000 per person. This is, as you may be aware, significantly less then many so-called third world countries which receive aid and assistance from the United States.

The persons who live at Rocky Boy are largely descended from persons who refused to give up their traditional beliefs or submit to the regulation of the United States government. They have continuously carried out the Sun Dance and other ceremonials and in recent years have encouraged a resurgence of interest in the Ancient ways of our peoples.

It is with great pleasure I offer the testimony of the Original Chippewa Cree, who are recognized as representing the interests of the traditional religious elders at Rocky Boy.

While my government does not always agree with their stands and positions, in this case we whole heartedly endorse their recommendations and offer them as our own.

B. ARGUMENT

We believe that the most important and immediate action that this committee can take is to provide some sort of automatic stay of a decision of the BLM, so that the sites can be protected during sometimes long and protracted appeals. In this case the OCC did file a nomination form with the state agency to nominate all of the area which is to be mined to the National Historical Register prior to the decision of the BLM, but the BLM disregarded this action and allowed the destruction to proceed.

As the smallest and poorest Tribe we do not have the resources to go to federal court to protect our rights, we must rely on the fairness of the administrative appeal process. In the Sweet Grass Hills case, our Tribe did not even get a copy of the decision so that we could appeal, even though we are listed on the certificate of mailing as receiving one. If we had been notified in advance, of the decision we would have appealed and we are on record as supporting the appeal of the Traditional Government.

C. CONCLUSION

I personally, and not as a member of the Business Committee of the Chippewa Cree Tribe, have used the Sweet Grass Hills every year since 1977, when my grandfather first took me to the Hills to worship. I will make some comments on the importance of the Hills to me and to my people.

Thank you very much for this chance to testify in front of the committee, and we would like to testify at any future hearings.

WRITTEN TESTIMONY
BEFORE THE SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
CONCERNING

CONSTITUTIONALITY OF PROPOSED AMENDMENTS TO THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT

DAVID C. WILLIAMS
ASSOCIATE PROFESSOR OF LAW
CORNELL LAW SCHOOL
OCTOBER 12, 1989

The amendments proposed to the American Indian Religious Freedom Act <[1]> by S.1124, 101st Congress, extend a limited statutory protection to Native American site-specific religions and in so doing inevitably implicate the Religion Clauses of the United States Constitution. Under Supreme Court precedent, the two clauses set up a tripartite classification of statutory accomodations of religion. Some such accomodations are constitutionally required by the Free Exercise clause. <[2]> The Supreme Court has already for all intents and purposes ruled that the proposed amendments do not fall into this category. <[3]> On the other hand, some such accomodations are constitutionally prohibited by the Establishment Clause. <[4]> Because they seemingly single out Native American religions for special treatment, the proposed amendments risk falling into this category. But there is a third category--accomodation of religion that is neither prohibited nor required but that is a matter of legislative discretion. <[5]> I believe that, rightly viewed, the amendments fall into this third category.

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[1] 42 U.S.C. Section 1996.

[2] *See, e.g., Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987).

[3] *See Lyng v. Northwest Indian Cemetery Protective Association*, 108 S.Ct. 1319 (1988) (holding that federal land management decisions do not burden Native American Free Exercise rights).

[4] *See, e.g., Texas Monthly v. Bullock*, 109 S.Ct. 890 (1989).

[5] *See, e.g., Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 483 U.S. 327 (1987).

The Court has derived two doctrinal hurdles from the Establishment Clause that all accomodations of religion must leap. These two hurdles are today associated with two landmark cases. First, *Larson v. Valente* provides the rule for statutes that make "explicit and deliberate distinctions between different religious organizations," <[6]>: such statutes are invalid unless narrowly drawn to serve a compelling state interest. <[7]> *Larson* seems to govern the amendments on their face, because they seem to draw a distinction between Native American religions and all others. In fact, however, Native American religions are unique in holding "certain lands or natural formations" located on federal property "to be sacred." The statute thus, in effect, does not distinguish between Native American religions and all others; rather, as a practical matter, it neutrally protects all religions that regard particular sites on federal land as holy.

Second, *Lemon v.Kurtzman* provides the three-pronged rule for statutes that neutrally accomodate religion, without singling out particular religions: the statute must not be wholly motivated by religious concerns; it must not have the primary effect of advancing or inhibiting religion; and it must not unduly entangle the civil government with religious bodies. <[8]> The statute satisifies all three of these requirements: its principal effect is not to promote Native American religions but simply to allow Native Americans to continue their religious practices without interference from the government; its secular motivation is to bring about that permissible primary effect; and the entanglement created by the statute is no greater than that actually mandated by the Court in Free Exercise Clause cases, because the federal administrator need only ascertain whether the Native Americans regard a particular site as sacred and indispensable, whether the site is necessary to a religious practice, and whether a proposed management decision will pose a substantial and realistic threat of undermining that practice.

The following testimony will amplify this legal analysis, but let me begin with two background matters--a brief description of the statute emphasizing features that are important for the constitutional analysis, and an analysis of recent Supreme Court dicta that directly anticipate the amendments and suggest that they are constitutional.

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[6] 456 U.S. 228, 246-47 n.23 (1982).

[7] *Id.* at 247.

[8] *See* 403 U.S. 602, 612-13 (1971).

I. Lyng v. Northwest Indian Cemetery Protective Association

The statute, in effect, statutorily extends to site-specific religions the same kind of protection--although perhaps not as great in degree--aa that accorded to other religions by the Free Exercise clause. Under the most recent Supreme Court precedent, the Clause recognizes a prima facie burden on religious liberty when a government practice: (1) substantially frustrates (2) a central religious practice. <[9]> Similarly, the amendments recognize a burden on Native American religion when a federal management decision: (1) poses a "substantial and realistic threat of undermining and frustrating" a site-specific religious practice and the site is necessary to that practice, and (2) the Native Americans have considered the site to be sacred and "indispensable." The Court has also held, however, that a compelling state interest may justify such a burden. <[10]> The amendments, too, provide that its protection of Native American religions shall not extend to management decisions which are "necessary to . . . protect a compelling governmental interest." On the other hand, the amendments do not offer quite as much protection as the Free Exercise clause extends to other groups. In particular, the amendments do not protect Native American religions from decisions necessary to "carry out the legal responsibilities of the Federal Government" or to "protect a vested property right"--even if in particular cases those interests are not technically "compelling." Thus, the amendments roughly parallel the structure of Free Exercise clause doctinre but do not offer as much protection.

It is important to bear this point in mind when considering the significance for the amendments of Lyng v. Northwest Indian Cemetery Protective Association. <[11]> In Lyng, Native American plaintiffs argued that the Free Exercise clause bars federal land management decisions that would frustrate Native American religious practice--that the clause, in effect, requires the proposed amendments. Three justices--Justices Brennan, Marshall, and Stevens--endorsed this argument, believing that the amendments are thus not only constitionally permitted but actually consitutionally required. A majority of the Court, on the other hand, rejected the challenge on the grounds that internal governmental decisions do not technically burden Free

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[9] See Hernandez v. Commissioner of Internal Revenue, 109 S.Ct. 2137, 2148-49 (1989).

[10] See Hernandez, 109 S.Ct. at 2148.

[11] 108 S.Ct. 1319 (1988).

Exercise rights. <12> Dicta in the opinion, however, fairly invites Congress to pass the proposed amendments.

On at least two separate occasions, the majority's opinion indicates that the collision of Native American religions and federal land-use decisions is an appropriate area for Congressional action. Thus, the Court asserted: "The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions." <13> And later: "Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to the use of its own land, for example, need not and should not discourage it from accomodating religious practices like those engaged in by the Indian respondents." <14>

Finally, the *Lyng* Court directly considered the meaning of the unamended American Indian Religious Freedom Act and at no point intimated that it might violate the Establishment Clause, even though it too singles out Native American religions for special treatment. True, the unamended statute merely sets forth a policy in favor of protecting the "traditional religions of American Indians" and requires administrators to consult with native religious leaders about decisions that might disrupt such religions; <15> it creates no judicially enforceable substantive rights <16>--unlike the proposed amendments. Nonetheless, it does extend special treatment to Native American religions that at least in some cases will presumably lead to protection of those religions. Presumably, in making his decisions under AIRFA, the federal administrator will give at least some weight to the Congressional policy statement and will have his view informed by the required consultation with Native Americans. As a result, in some cases, the administrator will extend protection when he might otherwise have not. Yet despite the singling out of Native Americans for this careful treatment, the *Lyng* Court nowhere hinted that AIRFA might violate the Establishment Clause.

In short, then, the Supreme Court has indicated in a variety of ways that it will prove receptive to these amendments. It is

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[12] 108 S.Ct. at 1325.

[13] *Id.* at 1327.

[14] *Id.* at 1327-28.

[15] *See* 42 U.S.C. Section 1996.

[16] *See Lyng*, 109 S.Ct. at 1328.

important to bear that fact in mind when analyzing whether the amendments meet the doctrinal requirements of the Establishment Clause.

II. Larson v. Valente

The first and most obvious constitutional difficulty with the proposed amendments is that they single Native American religions out for special treatment. Only American Indians receive statutory protection of their sacred sites, over and above whatever the Free Exercise Clause requires. As noted, Larson holds that Congress may not "make explicit and deliberate distinctions between different religious organizations" unless a compelling state interest justifies that treatment. <[17]> At first inspection, the bill appears to distinguish between Native American religious organizations and all others.

In practical effect, however, the amendments do not single out Native American religions but rather all religious individuals who regard sites on federal land as inherently sacred. As part of the bill, Congress finds, "unlike any other established religion, many traditional Native American religions are site-specific in that the Native American religions hold certain lands or natural formations to be sacred." Certain Native American religions and religious individuals thus form a unique class by themselves; they alone believe that federal sites are inherently sacred. Moreover, not all Native American religions have such sacred sites (the Native American Church for example), so the bill does not protect all Native American religions. The category thus described by the bill actually cuts at right angles to the category "Native American religions"; it includes some but not all Native American religions, and it would include site-specific non-Indian religions, but there are none. In short, the bill's coverage extends to all and only site-specific religions.

For this argument to succeed, the underlying premise must be accurate: Native Americans must be the only site-specific religions. Although the Court will surely give some weight to Congress' findings on this matter, it will also not feel required to regard the findings as dispositive. Several factors, however, suggest that the Court will conclude that Native American religions are unique in the site-specificity of their religions. First, for a case to come to court, the Court must have a non-Indian plaintiff who "hold[s] certain lands or natural formations to be sacred" and who can therefore claim that the bill unconstitutionally excludes him and includes Native American religions. If Congress' findings are accurate, the existence of such a plaintiff is extremely unlikely; and absent such a plaintiff, the existence of obscure non-Indian site-specific religions is wholly a matter for speculation, beyond the reach of judicial notice.

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[17] 456 U.S. at 246-7 n.23.

Second, the category protected by the bill is not simply religions with sacred sites but more particularly all religions with sacred sites *on federal land*. The Senate is concerned in this bill with a particular problem: how best to administer federal lands, by both serving the general public interest and also not undermining the religious practice of those who hold federal lands sacred. The bill seeks only to develop a responsible policy for the federal government as a property-owner. Thus, it deals only with the management of sacred sites on federal land. As a result, any hypothetical plaintiff who might challenge the bill must regard some feature of federal land as sacred. Again, such a plaintiff is unlikely. As the bill notes, Native Americans regard federal sites as sacred for a reason: "[M]any of these sacred sites are found on lands which were formerly part of the aboriginal territory of the Indians but which now are held by the Federal Government."

Finally, the statute deals with religions that hold certain sites to be inherently "sacred," "indispensable," and "necessary" to religious practices, and not with religions that merely venerate particular sites. Congregants at Boston's Old North Church may venerate that church as an ancient and beloved place of worship, but the building is not in itself inherently sacred and the congregants can worship elsewhere. By contrast, Native Americans believe that certain areas of the Earth possess inherent religious significance that exists nowhere else, and so they can engage in their practices nowhere else. Again, there is a good reason for regarding such religions as a unique class: religions that merely venerate particular sites are not truly site-specific because their religious practices may take place in a variety of locations; some Native American religious practices may take place at one and only one location. <[18]>

In short, then, although the bill by its terms applies only to "Native American religions" with sacred sites, the true category at issue is all religions who hold particular sites on federal land to be inherently sacred and indispensable. The Court has engaged in a similar search for the true category lying behind a seemingly suspect category before. In *Geduldig v. Aiello*, <[19]> for example, the Court considered the constitutionality of a state statute that payed disability benefits for loss of work arising from a broad range of medical difficulties but not pregnancy. Challengers argued that the law effectively discriminated between men, who were covered for all disabilities, and women, who were not covered for pregnancy. The Court, however, held that the statute discriminated not between women and men but between "pregnant women and nonpregnant persons." The distinguishing feature is therefore not gender but the "physical condition" of pregnancy. <20> Similarly, under the proposed amendments, the statute would distinguish between site-specific Native American religions and non-site specific religions. Again, the distinguishing feature is not membership in a Native American religion but belief in the sacredness of particular sites. Similarly, the Court in Geduldig conceded that the allegedly invalid category was "exclusively female," but the other category was composed of both men and nonpregnant women, so that the division was not drawn on the basis of gender. <21> In the same way, the allegedly invalid category here is composed of exclusively Native American religions but the excluded category includes both Native American and non-Native American religions. And presumably, in Geduldig, the legislature would have granted men pregnancy disabilities--but there are no such creatures. In the same way, the Senate would presumably protect non-Native American site-specific religions, but it has expressly found that none exists.

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[18] *See* D. Williams and S. Williams, Volitionalism and the Free Exercise Clause (forthcoming).

[19] 417 U.S. 484 (1974).

Even so described, the statute does still in effect single out a category of religions for special treatment: those who hold certain sites on federal lands sacred. This category, however, is not the type forbidden by Larson. Larson concerned a state statute that required all charitable organizations to file elaborate documentation with the Minnesota Department of Commerce before they could solicit contributions--except religious organizations that received more than half of their contributions from members. The Court described this arrangement as a "denominational preference" because it makes "explicit and deliberate distinctions between religious organizations"--in particular between "well-established churches" and "churches which are new and lacking in a constituency." <22> The Court, however, carefully distinguished its holding from that in Gillette v. United States, <23> in which the Court upheld Section 6(j) of the Military Selective Service Act <24> against Establishment Clause attack. Section 6(j) afforded conscientious

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[20] Id. at 496-97 n.20.

[21] See id.

[22] 456 U.S. at 246-47 n.23.

[23] 401 U.S. 437 (1971).

[24] 50 U.S.C. App. Section 456(j) (1964 ed., Supp. V).

objector status to any person who "by reason of religious training and belief" was "conscientiously opposed to participation in war in any form." The section thus discriminated between those who were religiously opposed to all war--who were exempt--and those who were religiously opposed to particular wars--who were not. The *Larson* Court, however, explained that the distinction made by Section 6(j) was drawn on the basis not of "sectarian affiliation" but of "individual conscientious belief." Any individual, regardless of his organizational ties, may qualify for the exemption offered by Section 6(j) if he entertains the relevant beliefs. In contrast, the *Larson* statute "focuse[d] prescisely and solely upon religious organizations" because it prescribed conduct for sects, not for individuals at all. <25>

The proposed amendments to AIRFA draw the *Gillette* type of distinction. The amendments nowhere even refer to religious organizations. They do refer to Native American religions and religious practices, but they use those terms to refer to collections of religious ideas and ceremonies about the sacredness of land, and not to particular sects. At no point do the amendments suggest that one even has to be a member of an organization to benefit from the law, as long as one subscribes to the beliefs of traditional Native American religions. Indeed, the amendments contemplate that a "person," not an organization, may bring a civil action to enforce the provisions of the bill. In short, the amendments "focus on individual conscientious belief [that certain sites are sacred], not on sectarian affiliation."

In addition, even if the amendments did distinguish between sects, they would still be valid, because even though they may distinguish between religions, they do not enact a "denominational preference" at all. Here, a comparison between *Larson*, on the one hand, and the recent case *LDS v. Amos*, <26> on the other, is instructive. In *Amos*, the Court considered Title VII's exemption of religious organizations from its prohibition of religious discrimination in employment. <27> On the face of the statute, Title VII draws a distinction between two types of religious organizations: those that have employees and those that do not. Yet the Court never even bothered to consider whether this distinction created a denominational preference for one

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[25] 456 U.S. 246-47 n.23.

[26] *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

[27] 42 U.S.C. Section 2000e-1.

group or the other--and for good reason. <[28]> In order to prefer one group of religions, the legislature must treat that group better than some other along some common ground of comparison. Title VII does free religions that have employees from its restrictions on employment discrimination, but that does not create a preference for employing religions--because for religions without employees, the whole issue of employment discrimination is utterly irrelevant. To maintain linguistic equality, the statute might also have exempted religions without employees from its restrictions on employment discrimination, but that would have been an exercise in empty pedantry. On the subject of employment discrimination, then, there is simply no adequate basis on which to compare religions that have employees and those that do not. In Larson, by contrast, a common ground of comparison did exist. The statute considered all religious organizations that wanted to solicit contributions within Minnesota, and it simply accorded one group--those with more than half of their contributions from members--an obvious advantage by exempting them from filing requirements.

The proposed amendments are of the Amos type. They do single out one group of religions, those with site-specific practices, just as Title VII singles out one group of religions, those with employees. But the amendments do not treat site-specific religions better than non-site-specific religions on any common ground of comparison. True, the amendments do protect sacred sites, but they do not "prefer" site-specific religions over others--because the protection vel non of such sites is utterly irrelevant to the circumstances of non-site-specific religions. To preserve linguistic equality, the amendments might protect the sacred sites of non-site-specific religions, but again that would be an absurd gesture. On the treatment of sacred sites, then, there is no adequate basis on which to compare those that have them and those that do not. Rather than granting a preference, the statute merely treats differently those that are differently situated. Rather than trying to treat Native Americans better than others, the statute merely tries to formulate a "coherent policy" for the management of federal lands and to respond to the fact that only Native Americans have a substantial religious interest in the formulation of that policy. <[29]>

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[28] Indeed, at one point, the Amos Court specifically held that Larson did not apply to Title VII's exemption because that statue affords a "uniform benefit to all religions." 483 U.S. at 339.

[29] I should add that I do not believe that the linked concepts of Congress' fiduciary responsibility and plenary power over American Indians will justify the singling out of Native American religions for special treatment. In modern

II. *Lemon v. Kurtzman*

Even statutes that do not create facial denominational preferences must survive analysis under the familiar rule of *Lemon v. Kurtzman*, <30> designed to determine whether the statute unconstitutionally promotes religion in general. *Lemon*'s requirements are three: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive governmental entanglement with religion.'" <31> The Court has offered some recent, important glosses on this language in a pair of cases which suggest that the proposed amendments will easily pass constitutional muster.

As already noted, *Amos* upheld the exemption of religious organizations from Title VII's ban on religious discrimination in

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jurisprudence, the Bill of Rights applies to Congress' treatment of Indians as fully as it does to Congress' treatment of any other American citizens, despite the fiduciary responsibility and plenary power. *See County of Oneida v. Oneida Indian Nation*, 105 S.Ct. 1245 (1985); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 (1980). The fiduciary obligation and plenary power do change the meaning of the Bill of Rights slightly, but only in two discrete circumstances. First, Congress may manage land held in trust for the Indians in ways that would violate the Just Compensation clause if held in fee simple, by Indians or non-Indians. *See Sioux Nation*, 448 U.S. at 416-17. The sacred sites covered by the bill, however, are not on land held in trust for the Indians, so this rule is inapplicable. Second, the Federal Government, under its plenary power and in execution of its fiduciary responsibility, has routinely singled out Native American tribes for special treatment, and the Court has held that this singling out does not constitute racial discrimination under the Equal Protection Clause because the category "Indian" is a political classification not a racial one, when drawn by Congress. *See Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974). But this holding means only that Indian tribes are not racial categories under the Equal Protection clause, not that Indian religions are not religious categories under the Establishment Clause. *Morton* narrowly held only that when Congress treats with Indian *sovereigns*, it does not commit *racial* discrimination; it did not hold that when Congress treats with Indian *religions*, it does not commit *religious* discrimination.

[30] 403 U.S. 602 (1971).

[31] *Id.* at 612-13 (citations omitted).

employment. It was careful to stress: "There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." <[32]> Last term, in Texas Monthly v. Bullock, <[33]> the Court struck down a Texas statute that exempted religious literature from its sales tax. It is fair to say that the tone of Texas Monthly may have been decidedly cooler than that of Amos towards accomodation of religion in general, but several points may put this tone in perspective. First, Texas Monthly was a three-judge plurality opinion and so not a representation of the attitude of the Court as a whole. Second, Texas Monthly explicitly reaffirmed Amos, <[34]> so the two cases are at least nominally consistent. Third, two of the three justices who formed the plurality in Texas Monthly--Justices Brennan and Marshall--also believe that the proposed amendments are constitutionally required by the Free Exercise Clause. <[35]> Thus, whatever their attitude toward accomodation in general, they would vote to uphold the proposed amendments. Finally, as I will detail, the amendments should survive under either the broad language of Amos or the stricter language of Texas Monthly.

Amos considered the secular purpose and effect prongs of the Lemon test as two sides of the same coin. The Court held that for a purpose to be secular, it need not be unrelated to religion; rather, it is a permissible secular purpose to "alleviate significant governmental interference with the ability of religious organizations to define and carry out their mission" as long as that alleviation does not verge over into promotion. <[36]> Similarly, the Court held that under the effect prong, "a statute is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence." <[37]> For both prongs, in other words, the critical question is whether the purpose or effect of the law can better be understood as removing government-imposed obstacles to the practice of religion (which is allowed) or as throwing the weight of government support behind religion (which is not).

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[32] 483 U.S. at 334.

[33] 109 S.Ct. 890 (1989).

[34] Id. at 901 n.8.

[35] See Lyng, 108 S.Ct. at 1330.

[36] 483 U.S. at 335.

[37] Id. at 337.

The proposed amendments fall into the former category; they simply remove obstacles to Native American religious practice. The stated purpose of the bill is not to advance or promote Native American religion but "[t]o provide a means to ensure that the management of Federal lands does not undermine and frustrate traditional Native American religious practices." The bill responds to recent federal management decisions that have greatly impeded Native American religious observance, and its operative provisions merely remove that impediment: federal lands that are "sacred and indispensable" and "necessary" to a Native American religious practice "shall not be managed in a manner that will pose a substantial and realistic threat of undermining and frustrating such religion or religious practice." The amendments also carefully avoid any appearance of endorsing or promoting Native American religious viewpoints by carefully balancing the protection extended to sacred sites against other legitimate interests. Federal managers may frustrate Native American religious practice if necessary to carry out the legal responsibilities of the Federal Government, to protect a compelling governmental interest, or to protect a vested property right. Moreover, nothing in the bill "shall be interpreted as requiring any Federal agency to totally deny public access to Federal lands," so that federal managers must always seek to reconcile the public's right of access and the Indians' right to religious liberty.

Texas Monthly's observations on the purpose and effect prong are consistent with this analysis. The plurality observed that statutes that extend benefits "exclusively to religious organizations" rather than to a broad range of both religious and secular activities are generally invalid under these prongs. <[38]> The opinion did, however, recognize several exceptions to this rule. First, in some cases, the Free Exercise Clause may require that benefits be directed exclusively to religious organizations; <[39]> again, two of the three justices in the plurality believe that the Free Exercise Clause does require the proposed amendments, so that the plurality would presumably uphold this bill. Second, even if the Free Exercise Clause does not require them, some statutes targeted at religious groups may "be seen as removing a significant state-imposed deterrent to the free exercise of religion." <[40]> Later in its opinion, the Court explained that Amos falls into this category: even though the Free Exercise Clause does not require Title VII's exemption of religious organizations, that exemption "prevented potentially serious encroachments on protected religious freedoms." <[41]> The majority in Lyng described disturbance of sacred sites in almost exactly these terms. Even though it held that the Free Exercise Clause does not technically require the protection of the sacred sites, the majority did acknowledge: "The Indians use this area, as they have used it for a very long time, to conduct a wide variety of specific rituals that aim to accomplish their religious goals. According to their beliefs, the rituals would not be efficacious if conducted at other sites than the ones traditionally used, and too much disturbance of the area's natural state would clearly render any meaningful continuation of traditional practices impossible. . . . [W]e can assume that the threat to the efficacy of at least some religious practices is extremely grave." <[42]>

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[38] 109 S.Ct. at 899.

[39] See id.

[40] Id.

Finally, the bill satisfies Lemon's third requirement, that the statute not foster "an excessive governmental entanglement with religion." <[43]> Under the amendments, some entanglement might occur in three ways. First, presumably administrators will still consult with Native Americans in order to determine whether proposed management decisions will frustrate their religious practice. Even under the present, unamended statute, however, federal administrators must do that, and the Lyng Court never suggested that such discussion fosters excessive entanglement. Second, the amendments contemplate that the administrators will sometimes tailor federal land use to avoid the frustration of Native American religious practices. The resulting management scheme might involve some interaction between Native American religionists and federal administrators; the government might open land to Indian celebrants, for example, under times or conditions when it is closed to the general public. Again, however, present law contemplates exactly the same system: after consultation, the federal managers will at least in some cases decide upon such management schemes in order to effectuate the Congressional policy "to protect and preserve for the American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including but not limited to access to sites, . . . and the freedom to worship through ceremonials and traditional rites." <[44]> Indeed, the Lyng Court fairly invited such interaction: "Nothing in our opinion should be read to encourage government insensitivity to the religious needs of any citizen. The Government's rights to the use of its own lands, for example, need not and should not discourage it from accomodating religious practices like those engaged in by the Indian respondents." <[45]>

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[41] Id. at 901-02 n.8.

[42] 108 S.Ct. at 1326.

[43] 403 U.S. at 613.

[44] 42 U.S.C. Section 1996.

The only possible new "entanglement" created by the amendments is that the discretion of federal managers in making land management decisions is now constrained, so that they must make a series of particular determinations. First, they must decide whether the federal lands "have historically been considered sacred and indispensable by a traditional Native American religion" and are "necessary to the conduct of a Native American religious practice." Second, the managers must determine whether proposed land-use decisions "will pose a substantial and realistic threat of undermining and frustrating" Native American religion. These determinations should by now be quite familiar to most responsible federal decision-makers: apart from the government's "internal affairs" such as land-use decisions, the Free Exercise Clause actually requires the courts and other federal officials to engage in precisely this sort of analysis, by determining "whether government has placed a substantial burden on the observation of a central religious belief or practice." <[46]> The Court has never suggested that such sensitivity to religious concerns constitutes excessive entanglement. Finally, the new amendments require federal administrators to determine whether management decisions which do frustrate Native American religions are nonetheless justified by one of three factors. First, the amdendments do not limit management decisions necessary to carry out a compelling state interest. Again, however, the "compelling state interest" standard is a familiar part of Free Exercise jurisprudence, and presumably federal administrators go through their days under an obligation to apply it outside the land-use context. Second, the bill does not apply to management decisions necessary to carry out the government's legal responsibilities or to protect a vested property rights, but both of these determinations are straightforward matters of wholly secular law and create no entanglement at all.

Conclusion

I have confined my observations to the constitutionality of the proposed amendments, rather than expanding to their political morality. Some of my Establishment Clause analysis, however, may be relevant to the amendments' ultimate advisability. It is unusual for a statute that facially seems to single out a particular group of believers to survive constitutional analysis, but the Native Americans are unusual. They form, by themselves, a unique class. As the bill observes, they are unique in holding particular sites on federal land to be sacred, and they are unique in being the former owners of that land. They must be treated distinctively because they are distinctive. That distinctiveness has meant that while other groups have flourished in the recent resurgence of traditional religion, the Indians have been dealt a stunning series of blows in the past decade. The pages of the Federal Reporter detail one instance after another of federal insensitivity to the site-specific nature of Native American religions. The proposed amendments do no more than correct that insensitivity and allow the Native Americans the same opportunities for religious practice and celebration that others routinely receive.

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[45] 108 S.Ct. at 1327-28.

[46] Hernandez, 109 S.Ct. at 2148.

NAM
National Association
of Manufacturers

Resources and Technology Department
Energy/Natural Resources Committee
Environmental Quality Committee
Council on High Technology
Defense Forum

SEP

September 26, 1989

The Honorable Thad Cochran
United States Senate
326 RSOB
Washington, D.C. 20510

Dear Senator Cochran:

The Senate Select Committee on Indian Affairs is scheduled to hold a hearing on S. 1124, the Indian Religious Freedom Act Amendments of 1989, on Thursday, September 28. The National Association of Manufacturers (NAM) has serious concerns about this legislation and its potential impact on multiple-use management of public lands.

S. 1124, sponsored by Sen. John McCain (R-AZ), would amend the American Indian Religious Freedom Act (AIRFA) to establish that, absent a "compelling federal interest," public lands historically used by a traditional Native American religion will be managed in a way to prevent any threat to such religious practices.

While S. 1124 sets forth laudable goals, the measure's language is so broad and vague that, if enacted, it will disrupt existing federal land-use planning practices and place an impossible burden on federal land managers and courts to inspect, measure and weigh Indian religious concerns.

In addition, the bill would give Native Americans virtual veto power over the public's right to use federal lands by giving statutory preference to traditional Native American interests over and above all other interests.

NAM believes that S. 1124, however well-intentioned, poses a significant threat to government agencies' ability to take a balanced approach to multiple-use management of public lands. Therefore, the association urges you to oppose this legislation in its current form.

Sincerely,

John Cohen

John Cohen
Associate Director
Energy & Natural Resources

1331 Pennsylvania Ave., NW
Suite 1500 - North Lobby
Washington, DC 20004-1703
(202) 637-3000
FAX: (202) 637-3182

HARRY REID
NEVADA

United States Senate
WASHINGTON, DC 20510

October 19, 1989

Brian McKay
State of Nevada
Office of the Attorney General
Carson City, Nevada 89710

Dear Brian:

Thanks for writing to inform me of your concerns about the impact on Nevada of S. 1124, the American Indian Religious Freedom Act Amendments.

I appreciate your taking the time to alert me to the various potential problems for Nevada that could be created by the legislation. I will not only review your concerns carefully as the Select Committee on Indian Affairs considers this legislation, but I will also pass them along to Chairman Inouye.

With all best wishes,

Sincerely,

HARRY REID
United States Senator

HMR:wm

1989 OCT 16 AM 9:51

State of Nevada
Office of the Attorney General
Carson City, Nevada 89710

BRIAN MCKAY
ATTORNEY GENERAL

October 9, 1989

The Honorable John McCain
United States Senator
Ranking Minority Member
Senate Select Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

Re: American Indian Religious Freedom Act Amendments
(H.R. 1546, S. 1124, and S. 2250)

Dear Senator McCain:

I understand that the record on the recent hearings for the proposed amendments has been left open for further comment. Enclosed is a letter concerning this issue which I recently sent to the members of Nevada's congressional delegation and which I would request be added to the record.

Sincerely,

Brian McKay

BMcK/BC/lhe

Enclosure

State of Nevada
Office of the Attorney General
Carson City, Nevada 89710

BRIAN MCKAY
ATTORNEY GENERAL

September 20, 1989

The Honorable Barbara Vucanovich
House of Representatives
206 Cannon House Office Building
Washington, D.C. 20515

Re: American Indian Religious Freedom Act Amendments
(H.R. 1546, S. 1124, and S. 2250)

Dear Congressman Vucanovich:

The proposed amendments to the American Religious Freedom Act of 1978 are a matter of great concern to Nevada. Our State, because of the overwhelming amount of federally-owned land within its boundaries, is particularly dependent upon the use of and access to those lands provided under current federal law for economic and recreational pursuits. Mining, ranching, and hunting, fishing, hiking and other forms of recreation could all be curtailed by the legislation. There are several reasons why the legislation should be opposed.

First, all three proposed amendments provide a veto power over the use of lands to Indian groups or individuals. If a group or individual claims an area of land as a site that is part of or necessary to or used in or indispensable to the practice of an Indian religion, absolute priority in the use of the land will be given to the practice of the religion. Any other use of the land that interferes with any aspect of any religious practice must surmount an unattainably high standard (such as showing a compelling governmental interest) or be entirely prohibited. The power to determine which lands are religious sites (often on the basis of an oral tradition that is all but unchallengeable) rests solely with the Indian group or individual, and the power to preclude any other citizen from using that land for any other purpose is similarly placed with the group or individual.

Second, most of Nevada's natural resources--from its wildlife to its mineral and oil and gas deposits to its scenic beauty--are on federally-owned land. The determinations by Indian groups or individuals that a significant number of religious sites exist could decimate current use as well as development of those resources. An illustration of this result is contained in the case the amendments are designed to overturn, *Lyng v. Northwest Cemetery Protection Association*, 485 U.S. ___, 99 L.Ed.2d 524 (1988). In *Lyng*, Forest Service attempts to protect eleven religious sites in a national forest by relocating a six mile section of existing road and setting aside 500 acre areas around each site were rejected by tribes asserting that the twenty-five square mile area surrounding the sites must be left entirely undisturbed and preserved for their exclusive use. The effect of demands for exclusive use of large areas are clear, but, further, it is a practical fact of life in Nevada that control of a critical area of land can entirely prevent access to the resources of a much larger area of land. The State has been successfully working to remedy this disabling control for some time now. The amendments will only exacerbate this situation.

Third, the exclusive use of religious sites and surrounding areas contemplated by the amendments confers *de facto* ownership of the land upon the Indian group or individual. No other use will be permitted. All other uses will be preempted or terminated. The preemption or termination will occur even though the right to practice a traditional religion is already amply and specifically protected in existing federal statutes. Those statutes include the American Indian Religious Freedom Act itself, the National Forest Management Act, the Federal Land Policy and Management Act, the National Environmental Policy Act, the National Historic Preservation Act, and the Archaeological Resources Protection Act. No such exclusive right to use, own and exclude others from publicly held lands in order to practice religion should be granted to any group or individual.

Finally, the constitutionality of a law that expressly advances and protects one religion over all other religions is highly questionable. Only a traditional Indian religion is given preferential status by the amendments. Even if another religion (as many do) holds as a basic belief the significance or the sacredness of the earth and of nature, it will not be accorded equal status with a traditional Indian religion. These amendments advance, protect and prefer one religion of one portion of all of our citizens. They should not be supported for that reason.

In summary, the proposed amendments to the American Indian Religious Freedom Act provide a veto power over uses of public lands to certain groups or individuals, provide control over the resources of vast areas, provide *de facto* ownership of those areas to particular groups and individuals, and place one religion in a position superior to all other religions practiced in the United States. The amendments are clearly insupportable, and I would urge you to oppose them.

Sincerely,

BMcK\BC\lhe

United States Department of the Interior

NATIONAL PARK SERVICE
P.O. BOX 37127
WASHINGTON, D.C. 20013-7127

IN REPLY REFER TO:

OCT 13 1989

Honorable John McCain
United States Senate
Washington, D.C. 20510-6450

Dear Senator McCain:

I appreciate this opportunity to answer questions about the National Park Service Ethnographic and Native American programs which the Select Committee on Indian Affairs raised in its October 2 letter. My responses are not always as complete as I would like, but they incorporate the best available information on the status of the two programs.

Question 1: "When do you expect to complete your ethnographic database identifying Native American religious sites?"

The ethnographic database is in the earliest developmental stage. Its policy basis has been established, its conceptual approach has been formulated, and appropriate methodologies are being defined. The need for resource ethnographies and inventories has also been determined for approximately one-third or about 100 of the total National Park System units, especially units whose resources are ascribed traditional cultural value by associated Native Americans. The National Park Service looks to the Ethnography Program as a vehicle for developing a professionally sound and management-oriented database that will enhance our ability to reach culturally informed decisions. The program was vigorously endorsed by the National Park System Advisory Board in 1988 and in 1989 by the report on Research and Resource Management prepared by the National Parks and Conservation Association. To date, we have completed eight studies that address some ethnographic issues. If priority were given to completion of the database, it could be accomplished within 10 years. Otherwise we project it will take several decades. We plan to initiate a pilot 5-year program in FY90-FY94 by allocating some current funding to this program.

Question 2: "How is the National Park Service attempting to collect this information?"

Two principal types of ethnographic studies will yield data on the sacred value of resources under Service management. Both are conducted by applied cultural anthropologists who work cooperatively with the involved Native Americans. One study type is the Ethnographic Overview and Assessment which reviews available documentary data, and discusses findings with the involved Tribes in order to identify data gaps or biases. This generates the subsequent study, a field-based resource ethnography or Traditional

Use Study. Traditional Use Studies require a team approach that has cultural anthropologists working with traditional Indian cultural experts to identify the valued resources and forms and frequencies of their use. The ideal study is a holistic or systemic consideration of the use and management of resources for sacred, subsistence, residential, or other cultural purposes, and of relationships between resource uses and other aspects of Native American lifeways. Contemporary peoples and their recent past are emphasized.

The study products include (a) management strategies for culturally appropriate consultations with Native Americans, (b) an inventory of culturally salient places that require avoidance or other special treatment by park planners and managers, and (c) a roster of places that could be eligible for listing in the registries managed by the Service, namely, the National Register of Historic Places and the National Historic or Natural Landmarks Programs.

In addition to the park Ethnography Program, the Park Service is initiating a program through its Interagency Resources Division to identify and register properties located beyond park boundaries that Native Americans define as having traditional cultural significance. As priorities allow, the Service also anticipates working directly with Tribes that indicate interest in establishing historic preservation programs.

Question 3: "What type of response have you received from American Indian Tribes in developing your ethnographic database?"

Tribal responses have varied. Tribal leaders usually welcome Park Service efforts to become informed about Tribal concerns and practices so that culturally appropriate development decisions can be made, but specific questions about site locations and uses may bring guarded responses. These reflect well-grounded fears that looters will desecrate sites if information becomes public, that cultural prescriptions about sharing religious knowledge exclusively with designated Tribal members will be violated, or that non-believers might denegrate Indian belief systems if these are made public.

Discussions with Tribal members about legal provisions for confidentiality contained in the Archeological Resources Protection Act and the National Historic Preservation Act, and Park Service policies for confidentiality, help reduce apprehensions. Concern about potential misuse of data has also been allayed by strategies such as restricting access to information to select Service staff, and using pseudonyms to report the results of individual interviews.

Question 4: "Apart from your administrative consultative process, what avenues, in your experience, are available for Native American religious leaders seeking to protect their rights to access to religious sites, given the Lyng decision?"

Another mechanism for addressing Native American concerns about places of traditional religious significance derives from the 1966 National Historic Preservation Act, as amended, especially Section 106. Briefly, it provides a system of problem identification and conflict resolution. State Historic Preservation Officers review Federal plans to assess their effects on historic properties that are listed or eligible for listing on the National Register of Historic Places or as National Historic or Natural Landmarks, and consider Federal consultations with potentially affected Native Americans. A finding of adverse effects or procedural problems triggers a consultation process involving the Federal agency, the State Historic Preservation Office, and affected Tribes, and discussion to identify mitigation measures. Failure of the interested parties to agree on a proposed course of action prompts a higher level review by the Advisory Council on Historic Preservation which recommends conciliation measures.

Question 5: "Does the National Park Service maintain records documenting each consultation with an Indian Tribe regarding impacts to their religious sites or practices?"

Available information suggests that records are maintained by staff in several different offices and hierarchical levels of parks, regional offices, the Washington office, and the Denver Service Center, a Servicewide planning unit, but no consistent Servicewide approach is used.

Question 6: "Could you please describe the notification process the Park Service currently utilizes to inform Indian Tribes of proposed development on Federal lands which may impact on their religious practices."

One region consults the National Register of Historic Places to determine the presence of known religious sites before initiating the notification process. Whether or not the Service knows that specific religious areas might be affected by proposed actions, Regional Offices mail notifications to the tribes and groups they believe may be affected by park development plans. Variations in this basic pattern may also occur, prompted by local factors such as the park's proximity to Tribal headquarters, language patterns, and mail service. Radio announcements, posted signs, notices in Tribal newspapers, and notices to interested native associations, supplement the usual techniques in some cases.

Question 7: "Do you feel there is enough similarity between Federal agencies, such as BLM, the Forest Service and the Park Service to warrant the development of uniform regulations and administrative processes to ensure the protection of Native American Religions and religious practices?"

Despite diverse missions, the several agencies maintain some similar relationships with Tribes that are traditionally associated with agency resources. Tribes themselves may maintain similar kinds of relationships with traditional resources, regardless of the particular agency that administers them. In either case, it would be useful for agencies to develop a limited core of uniform administrative procedures and basic professional guidelines and standards to ensure responsiveness to Tribal concerns, while each agency also maintains the latitude to tailor the general process to its particular circumstances.

Question 8: "Is your policy on Native American Religious Freedom reflected in departmental regulation?"

The policy provisions on Native American religious freedoms are incorporated into the 1988 National Park Service Management Policies, but our policies are not reflected in departmental regulation.

Thank you for the opportunity to address these important issues.

Sincerely,

JmRidenour

James M. Ridenour
Director

Native American Rights Fund
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10 October 1989

Honorable John McCain
United States Senate
SR-111 Russell Senate
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Washington, D.C. 20510

Re: Comments on S. 1124, A Bill To Amend The American Indian Religious Freedom Act of 1978

Dear Senator McCain:

The following are the comments of the Native American Rights Fund on S. 1124, a bill to amend the American Indian Religious Freedom Act of 1978, Pub. L. 95-341, 42 U.S.C. § 1996 (AIRFA). Since its enactment over a decade ago, AIRFA has been misinterpreted, misunderstood and misapplied by the federal courts and federal agency policy makers. The original intent of the Congress thus having been rendered a nullity, AIRFA is past due for an overhaul.

1. Summary of Major Points

Attached to this letter is a copy of the testimony presented by NARF at the July 18, 1989 hearing on H.R. 1546, Congressman Udall's bill to amend AIRFA. The substance of our comments on H.R. 1546 are relevant to S. 1124. For your convenience, however, we summarize our major legal and policy points below. We respectfully urge that you and your staff give serious consideration to these points and the extensive discussion of each which follows in our H.R. 1546 testimony.

a. Testimony Concerning *Lyng* and S. 1124:

1. The United States Supreme Court, in its decision in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. ___, 99 L.Ed.2d 534 (1988), essentially stripped Native people in the United States, and their land based religions, of any cognizable protection under the First Amendment to the Constitution. Because

the *Lyng* case was wrongly decided, Congress must amend and strengthen AIRFA to restore a fair balance between Native religions and the decisions and activities of federal land management agencies which threaten their very survival.

2. S. 1124 represents a major step forward in terms of the reestablishment of a legal means for Native people to challenge the decisions and activities of agencies which threaten their traditional religions. But several additional concepts must be built into S. 1124, based in part on lessons learned by Native people over the past decade since the enactment of AIRFA, and in part on the decision in *Lyng*. These concepts are all drawn from a draft of proposed AIRFA amendments developed over the past eight months by representatives from NARF, NCAI, and AAIA and include, at a minimum, the following points (Nos. 3-12).

3. AIRFA (and S. 1124) must include an express statement to the effect that "notwithstanding any other provision of law, each federal agency shall manage any lands under its jurisdiction in a manner that does not violate the provisions of AIRFA."

4. AIRFA (and S. 1124) must provide for the mandatory promulgation of rules by all federal land management agencies[1] to implement AIRFA as amended.

5. AIRFA (and S. 1124) must provide for mandatory consultation by written agreement (including provisions for funding the participation of the affected Native groups) between the agency initiating an action or plan and the affected Native tribe(s) or group(s).

6. AIRFA (and S. 1124) must require agencies to maintain a full and complete record of the consultation process, including a thorough discussion of all reasonable alternative courses of action (including "no action"), and the basis for the selection of the final course of action.

7. AIRFA (and S. 1124) must provide for a clearer articulation of the respective burdens of fact and law on the part of the Natives challenging some government action, as well as on

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[1] Other agencies, for instance, the U.S. Customs Service [border crossing issues], and the Defense Department on behalf of the branches of the Armed Forces and other Pentagon activities which have a direct impact upon military reservation or other public lands, must also be required to promulgate AIRFA rules.

the part of the government looking to sustain some proposed activity or conduct.

8. AIRFA (and S. 1124) must provide a clearer articulation of the means by which the government agency establishes as a matter of fact and law whether the proposed activity is the least intrusive upon the affected Native people and their religious practices.

9. AIRFA (and S. 1124) must require the involved federal agency to maintain in strict confidentiality -- unless waived by the Native group in writing -- the details of the affected Native religion and the impact of any proposed federal action on that religion.

10. AIRFA (and S. 1124) must include a provision expressly providing aggrieved Native people with standing to enforce the provisions of AIRFA, as amended.

11. AIRFA (and S. 1124) must require reviewing federal district court to review *de novo* the agency's findings of fact and conclusions of law.

12. And, finally, AIRFA (and S. 1124) must include a provision awarding attorney's fees and costs to Native people who prevail in legal actions against federal agencies to enforce the provisions of AIRFA, as amended.

b. Testimony Concerning Congressional Policy and Other Matters:

1. Federal land management agencies should not oppose the changes to AIRFA which we, tribes and others propose. Instead, they should view this as an opportunity to receive greater legislative and policy direction on this subject from Congress. Native religions and religious practitioners will continue to be dependent upon sacred land areas under federal management; in other words, their claims simply **will not go away**. Federal agencies should look positively and creatively at efforts by the Congress and the Native community to provide "mid-course corrections" to AIRFA, so as to hopefully avoid the unfortunate consequences which follow decisions in cases such as *Lyng* and *Means v. United States*, 858 F.2d 404 (8th Cir. 1988).

2. Timber, mineral, water-power and other development interests should similarly view S. 1124 as an opportunity to ensure

greater **certainty** in the federal land management planning and decision-making processes.

3. S. 1124 and other amendments to AIRFA suggested herein do not provide Native people with an absolute veto over federal lands; indeed, the proffered legal standards impose strict legal and factual proof requirements on Native people before land management decisions will be forced to yield. And no federal land management action will be required to yield when the federal interests are found to be compelling and the means the least restrictive on the affected Native religion.

4. Agency AIRFA regulations must be written and published, requiring the creation of Native advisory groups and "cultural liaison" positions of employment which would work closely and continuously with local offices of land management agencies. The United States Forest Service is presently contemplating such a restructuring of its decision-making processes. The creation of these advisory bodies and cultural liaison positions - all members of local, interested and affected Native tribes and groups - would bridge the cultural gap between the agencies and their Native constituencies, thus fostering greater understanding, communication, and mutual trust. Moreover, positive steps would be taken to meet the development interest groups' demands for **certainty** in planning and decision-making on public lands.

For specific comments concerning each of these major legal and policy points, please refer to the attached testimony or H.R. 1546.

2. Other Comments Specific To S. 1124:

a. Indispensability of sacred sites.

We do not believe that S. 1124 should incorporate a legal standard which utilizes the concept of indispensability of Native religious sites. Several serious problems emanate from the use of such a test.

Indispensability has been used for some time as part of the centrality-indispensability standard courts created as a legal threshold for Indians establishing a burden or infringement on religious free exercise. This standard cannot be found in American constitutional jurisprudence applying to the claims of other religious minority groups. Thus it is ethnocentric and unworkable, because it essentially shields federal agency decisions from first amendment free exercise scrutiny.

Such a result can not be tolerated after *Lyng v. Northwest Indian Cemetery Protection Association*, where both the majority and minority opinions rejected the centrality-indispensability standard, for different reasons. The majority in *Lyng* rejected the standard because it would require courts to hold

> that some sincerely held religious beliefs and practices are not "central" to certain religions despite protestations to the contrary from the religious objectors who brought the lawsuit. [This would have the effect] . . . of [requiring] us to rule that some religious adherents misunderstood their own religious beliefs. [This] . . . would cast the judiciary in a role that we were never intended to play. *Id.* at 552.

In dissent, Justice Brennan also rejected the Indian "centrality-indispensability" standard crafted by lower courts over the years:

> I believe it appropriate, therefore, to require some showing of centrality before the Government can be required either to come forward with a compelling justification for its proposed use of federal land or to forego that use altogether. *"Centrality", however, should not be equated with the survival or extinction of the religion itself. Id.* at 563 (emphasis added).

Indeed, given the use in S. 1124 of the "substantial and realistic threat of frustrating religious practices" standard, which was a compromise legal standard proposed by Justice Brennan in *Lyng* - a standard which falls between absolute protection of sacred sites and absolute destruction - any use of the term or concept "indispensable" is particularly unfounded and illogical.

To reemphasize, Native religions should not be forced to the brink of extinction before some recognition and protection is afforded. No other religion in America is subjected to such treatment. The use of terms like indispensability, however, invite that interpretation and result.

As a final related point, the Supreme Court made clear two years ago that non-Native religions and religious practitioners can change and still be entitled to first amendment protection. *See Hobbie v. Florida Unemployment Appeals Commission*, 480 U.S. 136, 94 L.Ed.2d 190 (1987). *Hobbie* involved an individual who changed religions and became a Seventh Day Adventist during the course of employment at a private jewelry store. Ms. Hobbie thereafter refused to work on Saturdays, which she had been required to do as part of her contract. She was fired and applied for unemployment benefits. The Supreme Court reversed the Florida Supreme Court's denial of benefits. "The First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired." 94 L.Ed.2d at 199.

The message from *Hobbie* is that Indian's and other Native people's religions and their spiritual relationship with the earth should not be frozen in time and space. The term indispensability compartmentalizes and locks Native people and their religious beliefs into set systems and paradigms. Congress recognized in 1978 with the first AIRFA that Native religions clearly cannot be treated that way. *See, e.g.,* discussion of the contrast between Judeo-Christian and Native religions in the 1979 AIRFA Task Force Report, Executive and Historical Summaries.

In sum, S. 1124 should not utilize a legal standard based on indispensability which continues the discriminatory treatment of Native religions.

b. ". . . the legal responsibilities of the Federal Government".

Subsection (b)(1)(A) of Section 3 of S. 1124 exempts entirely from the protection provisions of the bill "[federal] management decisions which are necessary to - carry out the legal responsibilities of the Federal Government." This provision creates a loophole of enormous proportions, one which ultimately renders S. 1124 valueless for Native religions. As amended, the new AIRFA would unquestionably be weaker than the 1978 AIRFA, as explained below. The purpose of these amendments should not be to water down an already ineffective law.

Federal land management agencies operate under a number of "organic" federal laws. The U.S. Forest Service, for instance, is guided by a number of statutes, notably the Wilderness Act, the Multiple Use and Sustained Yield Act, and the National Forest Management Act. The Bureau of Land Management implements the Federal Land Management Policy Act. The National Park Services is similarly guided by a host of federal laws establishing the various national parks around the country. These laws, in terms of S.1124, set the parameters of the "legal responsibilities of the Federal Government." **Yet it was these very laws (including others such as**

the Endangered Species Act) which Congress found, as a matter of legislative fact-finding in the first AIRFA, to violate - albeit unintentionally - the religions of America's Native peoples:

> Whereas the lack of a clear, comprehensive , and consistent Federal policy has often resulted in the abridgement of religious freedom for traditional American Indians;
>
> Whereas such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws;
>
> **Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, therefore, were passed without consideration of their effect on traditional American Indian religions;**
>
> Whereas such laws and policies often deny American Indians access to sacred sites required in their religions, ...

92 Stat. 469-70 (emphasis added).

This provision of S.1124 also raises the old adage of the exception which swallows the rule. For arguably every decision made and action taken by federal land management agency officials is pursuant to or in furtherance of the "legal responsibilities of the Federal Government." Otherwise the actions would be *ultra vires* and subject to attack under the Administrative Procedures Act or other federal statutory or constitutional causes of action. To exempt these decisions from the balancing process of S.1124, then, effectively eviscerates the purpose and intent of the amendment in the first place. In short, **all** agency decisions should be subject to the provisions of the amended AIRFA.

c. ". . . protect a vested property right."

This exception to the balancing process in S.1124, found in subsection (b)(1)(C) of Section 3, for protecting a "vested property right," raises similar concerns as those expressed in 2.b., above. Any vested property right in private third parties may very well have been taken subject to existing and superior rights of Native peoples. The federal government as a matter of law and policy should not be issuing leases or permits to use federal lands, or exchanging title to federal lands with state or local governments, or private parties, without first studying the implications for and consequences upon Native religious practices. That can only be accomplished by prior, meaningful and binding consultation with affected Native religious leaders.

d. Establishment Clause Concerns.

Last but certainly not least is the issue of possible Establishment Clause concerns raised by S.1124. We join a long list of individuals, tribes and organizations which believe that this concern is unfounded, for the reasons we articulate below.

The Supreme Court expressed the sentiment in *dicta* in its 1988 decision in *Lyng* that what the Indians sought in that case might very well establish a "religious servitude" on federal public lands. Opponents to Senator Cranston's proposed bill to amend AIRFA last year, and now H.R. 1546 this year, raised the same specter -- that of an absolute "veto" by Indians over decisions of federal land management agencies and officials. These claims, while perhaps superficially attractive, are little more than hyperbole.

In all but the most exceptional of circumstances Native groups have never and will never seek exclusive use of a land area for religious purposes. Neither the Indians in *Lyng* or in *Means* sought to absolutely tie up the sacred land areas they wanted to preserve and access. In *Lyng*, for instance, the record was clear that several of the Forest Service's espoused "multiple uses" would be fostered by preservation of the high country, including recreation, watershed protection, fishery habitat protection and enhancement, scenic values, as well as cultural resource protection. Similarly, in *Means*, the Sioux traditionalists who sought an application to construct Yellow Thunder Camp in the Black Hills National Forest did not seek to exclude recreationists or the grazing of livestock.

Native groups usually find their interests in alignment with other ostensibly vital interests served by the preservation of the federal public land base, and out of alignment with those interests who would seek to exploit the natural resources for private profit. Not that private profit is *per se* bad or wrong--indeed our economic system thrives on it--but often the range of interests immediately served by private profit is narrow and not multi-dimensional. Such is not the case with respect to the other values with which Native interests are aligned.

As to a strict Establishment Clause analysis, we offer the following view. The Supreme Court has established a three-pronged test for establishment in the decision of *Lemmon v. Kurtzman*, 403 U.S. 607 (1971). To sustain challenge under the Establishment Clause, a federal statute must: (1) have a secular legislative purpose; (2) its primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster an excessive government entanglement with religion. *Lemmon,* 403 U.S. at 612-13.

i. Secular Purpose.

S. 1124, as we would propose to have it amended, has a valid secular purpose. "Under the *Lemmon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corporation of Presiding Bishops v. Amos,* ____ *U.S.* ___, 107 S. Ct. 2862 (1987).[2] The Court has long recognized that the governments may (and sometimes must) accommodate religious practices without violating the Establishment Clause. *Amos, supra; Hobbie v. Employment Appeals Comm'n of Fla., supra.* It is well established, also, that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Amos, supra, quoting Walz v. Tax Comm'n*, 397 U.S. 644 (1970). "There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference,'. . . At some point, [however], accommodation may devolve into 'an unlawful fostering of religion.'" (citation omitted). *Id.*

This is not such a case where accommodation has fostered religion. Indeed, in introducing S. 1124 you stated that the true purpose of the amendments was to "achieve a balance of all of the competing interests." You correctly observed that Native American concerns are only one competing interest on Federal lands. In *Lyng*, the suit was an effort by many interests to stop the harmful effects of the building of the G-O road. In an unequivocal statement, You articulated the true purpose of the amendments by stating "[l]et us all strive to find the common ground which will accommodate the seemingly incompatible views of all affected parties. One of the cornerstones of this great Nation is religious freedom." S. 1124 Introductory Statement, *supra*.

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[2] Although accommodation has occurred primarily in unemployment cases, *see Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 130 (1987); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963), the principle applies to all cases where freedom to exercise one's religion is burdened.

This resolution of competing interests is properly undertaken by Congress, the appropriate branch of government. In *Lyng*, the Court supported this assertion by stating that the "Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislature and other institutions." 99 L.Ed.2d 548. Congress has taken upon itself the task of resolving competing interests on federal lands. Furthermore, "[t]he Government's rights to use its own land . . . need not and should not discourage it from accommodating religious practices like those engaged in by the Indian[s]." *Id.*

"Government efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion." *Allegheny County v. Greater Pittsburgh ACLU*, 57 U.S.L.W. 5052, n. 51. The amendment is the appropriate vehicle to remove heavy burdens on the Native American religious practices.

The concern in *Lyng* that Native Americans would in effect impose a religious servitude on the public lands is unfounded. It premises this assumption on the rationale that Native American religious practices could easily acquire *de facto* beneficial ownership of public lands by excluding all human activity but their own from sacred ares of the public lands. Again, the purpose of the S. 1124 AIRFA amendments is to resolve competing interest on federal lands and not to impose a religious servitude on federal lands. In fact, subsection (3)(b)(3) states that "[n]othing in this section shall be interpreted as requiring any Federal agency to totally deny public access to Federal land." S. 1124, *supra*.

Any fears generated by the notion that in some way the Native Americans will have a veto power over agency decisionmaking is unfounded. The amendments create a cause of action or juridically enforceable individual rights. If a federal court concludes that agency decisionmaking violated the amended AIRFA, it is only because the United States Constitution mandates such a result.

Strengthening AIRFA to give it some teeth, especially after the Supreme Court's decision in *Lyng*, fosters religious plurality and diversity in American--the ultimate objective of the First Amendment. The promotion of cultural and religious diversity and freedom for Native peoples also serves broad federal land policies of multiple use. And because the preservation of traditional religions and cultures is an essential focus of the mission of Native governments, AIRFA amendments help fulfill the broad United States policy of Indian self-determination and the government-to-government relationship between the U.S. and Native governments.

Importantly, AIRFA amendments foster and promote the 1978 AIRFA policies, which the past decade record makes clear have never been fulfilled. A "mid-course" correction in AIRFA is warranted by the past decade of continued ignorance, insensitivity and abuse of Native religions. Moreover, Native religious groups would not be given preferential treatment in the use of federal lands under a new AIRFA. The legal and fact burdens and standards built into the bill would insure only a fair balancing between the needs and interests of Native peoples and the government, a "fair accommodation" in Justice Brennan's view.

ii. Secular Effect.

Our view concerning the second *Lemmon* test is equally straightforward. S. 1124 or similar efforts to amend AIRFA would likewise have a primary secular effect. Our country's religious free exercise jurisprudence is built on a foundation of **accommodation**, recognizing that accommodation must vary in kind and degree if we are truly to be a diverse, plural religious society. Accordingly, the primary **effect** of AIRFA amendments would be to remove federal impediments to Native religious practices; i.e., to allow Native religious practices without interference. *See, e.g., Amos, supra.* In light of the ten year history of continued infringement of Native religion notwithstanding the 1978 AIRFA, and now *Lyng*, the situation becomes ever more compelling.

Under the second prong of the *Lemmon* test, a law fails to survive establishment clause review unless its "principal or primary effect neither advances nor inhibits religion."[3] In *Committee for Public Educ. v. Nyquist*, 413 U.S. 756 (1973), the

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[3] It seems this inhibition element in establishment clause analysis is analytically misplaced. If the law is inhibiting religion the free exercise clause should be triggered. Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1371, 1380-85 (1981).

Court made clear that its use of "primary" is not to be taken literally and denied the distinction required courts to ascertain whether a particular effect adverse to the clause is actually a statute's primary effect. *Id.* at 783-84, n. 39. The Court also found the distinction to require the invalidation of any statute having an effect that is "direct and substantial" as opposed to "remote and incidental." *Id.* at 784-85, no. 39. Subsequent cases have cited the *Nyquist's* interpretation of "primary effect" as authoritative, *see, e.g., Grand Rapids School Dist. Ball*, 473 U.S. 373, 394 (1985); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975), or simply reiterated its terms, *see, e.g., Estate of Thorton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985); *Wolman v. Walter*, 433 U.S. 229, 250 (1977).

In addition, in light of the *Lynch* opinion, the effect of a statute must not convey a message of government endorsement or disapproval of religion. *Lynch, supra*. An important concern of the effects test is whether the government sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. *Lynch, supra*. Disapproval conveys the opposite message. *Lynch, supra*.

Here the primary effect may be viewed as resolving the conflict of interest on federal lands. One interest in this conflict is Native American religious concerns. The government's policy of multiple-use of public lands has not taken into account many cultural interests affected by its policy. The effect of the amendments is to make federal agencies aware that their actions are infringing on religious concerns of all who make use of public lands. The effect is to advance the federal governments policy of multiple-use of public lands in an amicable manner.

It is true that the amendments have an effect of advancing Native American religious practices. However, this effect is incidental and remote compared to the large scheme involved in implementing the multiple-use policy, and in fostering religious free exercise. To argue that the agencies' consideration of Native American interest in public lands is substantial and direct and thus unconstitutional disregards the importance, which you recognize, of maintaining proper balance in the management of federal land. *See Thorton v. Caldor, Inc., supra* at 710.

Moreover, no problem arises under an endorsement analysis. AIRFA does not convey a message to nonadherents of Native American religions that they are outsiders, not full members of the political community, and that Native Americans are the insiders, favored members of the political community. Members of Judeo-Christian religious - mainstream religions - implicitly do not face laws and regulations which impermissibly infringe upon their beliefs and practices. Thus, to be treated equally members of minority religions, in this case Native religions, are entitled to receive some accomdative treatment. Such treatment, however, only puts them on a par with other religions, not in a favored or "endorsed" status.

iii. No Excessive Entanglement.

Finally, we tackle the question of "excessive entanglement." To be sure, because of the nature of Native religions, as land based, and because of the federal "ownership" of lands upon which Native sacred sites are located, there will undoubtedly be some government involvement in Native religion under any scheme to amend AIRFA. Chairman Udall in the original AIRFA debates recognized that if Christian sacred sites or holy places were located in the United States and not in the Middle East, our laws would no doubt protect their integrity and sanctity. Thus some interaction between government and religion will naturally result. But it is not unconstitutionally "excessive."

Lemmon counsels us to look at the "character and purposes of the institutions which are benefitted [by the statutory entanglement], the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority." 403 U.S. at 615. Two important points follow. First, one must not lose sight of the ultimate purpose of any enactment of federal Indian legislation. Although it may seem the government is favoring or endorsing Native American religious practices, the government is merely effectuating its plenary power over Indian affairs pursuant to the U.S. Constitution, Art. I, Sec. 8 -- the Indian Commerce Clause. Congress can ground legislation in the area of Indian affairs which results in "special treatment" in its unique obligation to Native people. *Morton v. Mancari*, 417 U.S. 535 (1977).

This unique obligation is well founded in history. A complete historical framework will reveal that Congress from the early 1800's has maintained this unique obligation to Native Americans. This long, continuous and unbroken practice of providing "special treatment" to Native Americans is well founded in our Nation's legislative halls. The practice is analogous to *Marsh v. Chambers*, 463 U.S. 783 (1983), where the Court held that the Nebraska legislature's practice of opening a session with a prayer by a chaplain paid by the State did not violate the Establishment Clause since the historical acceptance of the practice was rooted in almost 200 years of practice.

The 1978 AIRFA recognizes Congress' unique obligation to protect the religious freedom of Native Americans. AIRFA is thus an appropriate vehicle for fulfilling America's obligation to protect and preserve religious freedom for Native people; thereby insulating AIRFA from challenge under Establishment principles.

Second, because of the "minority" nature of Native religions, there is little fear that the resulting relationship between the federal government and Native groups will be the first step in an inevitable progression leading to the establishment of state churches and state religion. 403 U.S. at 624. There is no likelihood that the "downhill thrust" warned of in *Lemmon* will create a self-perpetuating and self-expanding governmental program impinging on the Establishment Clause.

Finally, as a generally accepted principle, religious free exercise does not run afoul of the Establishment Clause. *See, e.g., McDaniel v. Paty*, 435 U.S. 618 (1978).

3. Conclusion

The Supreme Court in *Lyng* produced what Justice Brennan described to be a "cruelly surreal result. . . [where] governmental action that will virtually destroy a religion is nevertheless deemed not to 'burden' that religion." S. 1124, like H.R. 1546, represents a critical first step to raise Indian religion "like the Phoenix from the ashes" of the *Lyng* decision. Thank you for this opportunity to share our views on *Lyng* and S. 1124.

Sincerely,

Steven C. Moore

Walter R Echo-Hawk

Walter R. Echo-Hawk

TESTIMONY OF STEVEN C. MOORE, STAFF ATTORNEY, NATIVE AMERICAN RIGHTS FUND BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES INTERIOR AND INSULAR AFFAIRS COMMITTEE ON H.R. 1546, A BILL TO AMEND THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT OF 1978.

JULY 18, 1989

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A. Introduction

Mr. Chairman and members of the Interior and Insular Affairs Committee, I am indeed honored to testify before you today on H.R. 1546, a bill to amend the American Indian Religious Freedom Act of 1978, Pub. L. 95-341, 42 U.S.C. §1996 (AIRFA). The Native American Rights Fund wishes to extend its appreciation to Chairman Udall for introducing H.R. 1546.

Since its inception in 1971, the Native American Rights Fund has been committed to the preservation of religious freedom for American Indians. It was indeed more than a decade ago that three of my colleagues at the Native American Rights Fund - Suzan Shown Harjo, Walter Echo-Hawk and Kurt Blue Dog - worked with members of Congress and their staffs to create the original bill which ultimately became AIRFA. These same individuals also participated in a series of nationwide public hearings where Indian people testified concerning the religious persecution they faced because of existing federal laws and policies which advertently or inadvertently interfered with the practice of their traditional religions. Ms. Harjo and Mr. Echo-hawk also testified in June of 1982 before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee which held oversight hearings on AIRFA enforcement matters.

In addition to our work relating to AIRFA, NARF staff members have been involved over the past 19 years in litigation in numerous state and federal forums, and before numerous administrative agencies, advocating for the religious free exercise rights for Indian people. Such advocacy includes numerous challenges to mineral, waterpower timber and other natural resource development on public lands which threatens Indian sacred sites; the protection of Indian gravesites discovered on state or Federal lands; efforts to secure repatriation and reburial of the remains of Indian ancestors now stored in state and Federal museums and other institutions; and Native Americans incarcerated in Federal and state correctional institutions.

You, Chairman Udall, are absolutely correct in your assessment in your introductory statement to H.R. 1546 that AIRFA must be "given some teeth" so that Native people have a "fighting chance to preserve their precious religions and cultures." We at NARF have experienced over the past decade the frustrations of our clients and other Native groups when it came to their understanding of AIRFA. As it turns out, a national statement of policy concerning Native religious freedom has been of little utility in preserving sacred lands under federal ownership; in most instances AIRFA has only raised the hopes and expectations of traditional Native people. In real terms AIRFA has produced no significant changes in the way federal agencies manage the lands and other resources under their respective jurisdictions.

NARF and other national Indian organizations, notably NCAI and AAIA, as well as Native tribes and other groups, believe we are at a critical crossroads in terms of the very survival of traditional Native religions. These religions are dependent upon the preservation of sacred land areas, most of which today are located on federal public lands. Too many sacred areas have already been destroyed. Agencies must become more aware of these religions and their connection to sacred land areas, and must take **real** steps to accommodate them by preserving and protecting the integrity of these land areas, and access to them by religious practitioners. While we are beginning to see some positive changes in agencies such as the Forest Service, if more widespread and formal changes are not introduced these religions are doomed to perish.

It is indeed simultaneously ironic and tragic that the United States has more stringent laws on the books for the protection of endangered species of plants and animals them for its remaining indigenous religions and cultures. Our constitutional democracy espouses cultural and religious plurality. What will we as a society do - how will we respond - for these religions which have been pushed to the brink of extinction?

If the 1988 decision of the Supreme Court in *Lyng v. Northwest Indian Cemetery Protective Association*, discussed below, pushed Native societies closer to the precipice, Congress, through strengthening AIRFA, can begin to retrieve them from the edge of the abyss.

B. Summary of Major Points.

Below is a brief synopsis of the major points included in the following testimony of the Native American Rights Fund.

Testimony Concerning *Lyng* and H.R. 1546:

1. The United States Supreme Court, in its decision in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. ___, 99 L.Ed.2d 534 (1988) essentially stripped Native people in the United States, and their land based religions, of any cognizable protection under the First Amendment to the Constitution. Because the *Lyng* case was wrongly decided, Congress must amend and strengthen AIRFA to restore a fair balance between Native religions and the decisions and activities of federal land management agencies which threaten their very survival.

2. H.R. 1546 represents a major step forward in terms of the reestablishment of a legal means for Native people to challenge the decisions and activities of agencies which threaten

their traditional religions. But several additional concepts must be built into H.R. 1546, based in part on lessons learned by Native people over the past decade since the enactment of AIRFA, and in part on the decision in *Lyng*. These concepts are all drawn from a draft of proposed AIRFA amendments developed over the past eight months by representatives from NARF, NCAI, and AAIA and include, at a minimum, the following points (Nos. 3-12).

3. AIRFA (and H.R. 1546) must include an express statement to the effect that "notwithstanding any other provision of law, each federal agency shall manage any lands under its jurisdiction in a manner that does not violate the provisions of AIRFA."

4. AIRFA (and H.R. 1546) must provide for the mandatory promulgation of rules by all federal land management agencies[1] to implement AIRFA as amended.

5. AIRFA (and H.R. 1546) must provide for mandatory consultation by written agreement (including provisions for funding the participation of the affected Native groups) between the agency initiating an action or plan and the affected Native tribe(s) or group(s).

6. AIRFA (and H.R. 1546) must require agencies to maintain a full and complete record of the consultation process, including a thorough discussion of all reasonable alternative courses of action (including "no action"), and the basis for the selection of the final course of action.

7. AIRFA (and H.R. 1546) must provide for a clearer articulation of the respective burdens of fact and law on the part of the Natives challenging some government action (with modification of the "historical" requirement) as well as on the part of the government looking to sustain some proposed activity or conduct.

8. AIRFA (and H.R. 1546) must provide a clearer articulation of the means by which the government agency establishes as a matter of fact and law whether the proposed activity is the least intrusive upon the affected Native people and their religious practices.

9. AIRFA (and H.R. 1546) must require the involved federal agency to maintain in strict confidentiality--unless

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[1] Other agencies, for instance, the U.S. Customs Service [border crossing issues], and the Defense Department on behalf of the branches of the Armed Forces and other Pentagon activities which have a direct impact upon military reservation or other public lands, must also be required to promulgate AIRFA rules.

waived by the Native group in writing--the details of the affected Native religion and the impact of any proposed federal action on that religion.

10. AIRFA (and H.R. 1546) must include a provision expressly providing aggrieved Native people with standing to enforce the provisions of AIRFA, as amended.

11. AIRFA (and H.R. 1546) must require reviewing federal district court to review *de novo* the agency's findings of fact and conclusions of law.

12. And, finally, AIRFA (and H.R. 1546) must include a provision awarding attorney's fees and costs to Native people who prevail in legal actions against federal agencies to enforce the provisions of AIRFA, as amended.

Testimony Concerning Congressional Policy and Other Matters:

1. Federal land management agencies should not oppose the changes to AIRFA which NARF, NCAI, AAIA and others propose. Instead, they should view this as an opportunity to receive greater legislative and policy direction on this subject from Congress. Native religions and religious practitioners will continue to be dependent upon sacred land areas under federal management; in other words, they simply **will not go away.** Federal agencies should look positively and creatively at efforts by the Congress and the Native community to provide "mid-course corrections" to AIRFA, so as to hopefully avoid the unfortunate consequences which follow decisions in cases such as *Lyng* and *Means v. United States*.

2. Timber, mineral, water-power and other development interests should similarly view H.R. 1546 as an opportunity to ensure greater **certainty** in the federal land management planning and decision-making processes.

3. H.R. 1546 and other amendments to AIRFA suggested herein do not provide Native people with an absolute veto over federal lands; indeed, the proffered legal standards impose strict legal and factual proof requirements on Native people before land management decisions will be forced to yield. And no federal land management action will be required to yield when the federal interests are found to be compelling and the means the least restrictive on the affected Native religion.

4. Agency AIRFA regulations must be written and published, requiring the creation of Native advisory groups and "cultural liaison" positions of employment which would work closely and continuously with local offices of land management agencies. The United States Forest Service is presently contemplating such a restructuring of its decision-making

processes. The creation of these advisory bodies and cultural liaison positions - all members of local, interested and affected Native tribes and groups - would bridge the cultural gap between the agencies and their Native constituencies, thus fostering greater understanding, communication, and mutual trust. Moreover, positive steps would be taken to meet the development interest groups' demands for **certainty** in planning and decision-making on public lands.

Specific comments concerning each of these major legal and policy points will follow.

C. *Lyng v. Northwest Indian Cemetery Protective Association* **Was Wrongly Decided**

Fifteen months ago on April 19, 1988, the United States Supreme Court handed down its decision in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. ____, 99 L.Ed.2d 534 (1988). *Lyng* involved the challenge by members of three northern California Indian tribes of a decision by the United States Forest Service to construct a road (commonly referred to as the "G-O Road") and related development activities through a sacred area in the Six Rivers National Forest known as the "high country." The Indians have for centuries used the high country for vision questing and other ceremonial and ritual purification purposes. After an extensive investigation of the ethnographic literature on the Yurok, Karok and Tolowa Indians and scores of interviews of primary Indian religious informants, the Forest Service's own expert anthropologist, Dorothea Theodoratus, concluded that the proposed land development activities would **destroy** the "very core" of their religious beliefs and practices. Theodoratus recommended that **no** road be built.[2]

Notwithstanding the recommendations of its **own** expert witness, the Forest Service officials decided to proceed with construction of the road at one of several alternative sites. These bureaucrats thus deliberately ignored the factual evidence before them and determined that certain mitigative practices would suffice to ameliorate the harm to the Indians' religion. They simply refused to believe the Indians' claims.[3]

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[2] The Advisory Council on Historic Preservation, responsible for enforcement of Section 106 of the National Historic Preservation Act, 16 U.S.C. §§170w *et seq.*, vehemently opposed the project on essentially the same grounds as those identified by Theodoratus.

[3] Two years ago Sioux Indians from South Dakota experienced similar treatment from James Mathers, Forest Supervisor of the Black Hills National Forest. Mathers denied their application for a special use permit to construct (Cont. on next page.)

After a lengthy hearing on Indians' motion, the federal district court in Northern California in 1983 permanently enjoined the Forest Service from constructing the G-O Road, on constitutional and Federal environmental statutory grounds. The court applied the traditional test articulated under the free exercise clause of the first amendment to the Constitution and held that the proposed activities impermissible burdened the Indians' religious free exercise rights and, moreover, the perceived government interests in development of the G-O Road were grossly speculative and insufficient to outweigh the Indians' interests. *See Northwest Indian Cemetery Protective Assn. v. Petersen*, 565 F.Supp. 586 (N.D. Cal. 1983).

In 1984 Congress set aside as wilderness, thereby removing from the controversy, much of the disputed high country, via the California Wilderness Act, Pub. L. No. 98-425, 98 Stat. 1619, in part because of the area's Native American cultural and religious importance. Congress was aware of the on-going legal dispute between the northern California Indians and the Forest Service and, out of deference to the judicial branch, excepted a 1200 foot wide corridor through the forest from wilderness designation for possible construction of the G-O Road. The Ninth Circuit Court of Appeals upheld the lower court's permanent injunction of the road's construction on constitutional free exercise grounds twice, first in 1985 and again on rehearing in 1986. *See Northwest Indian Cemetery Protective Assn. v. Petersen*, 795 F.2d 688 (9th Cir. 1986).

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[3] (Cont.) a spiritual encampment in the forest, despite the existence of several Christian church camps and the Rapid City Country Club in the same forest. Federal District Court Judge O'Brien admonished Mathers for his "clear error of judgment.

> In summary, the Court specifically finds the denial of the special use permit was arbitrary and capricious. The Court further finds that Forest Service policies as implemented by Mr. Mathers - including his decision to deny the special use application - have the effect of discriminating against Indians who are trying to practice their religion. The Court further finds that Mr. Mathers is subconsciously biased against Indian applicants. He acknowledges that Indian people should be treated equally. . . but just cannot bring himself to see that that happens.

United States v. Means, 627 F.Supp. 247, 269 (D.S.D. 1985); *reversed*, 858 F.2d 404 (8th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3842 (1989).

1. The Supreme Court Rejected The Indians' First Amendment Free Exercise Right.

The Supreme Court reversed the decision of the Ninth Circuit on several grounds. First, it held that the Free Exercise Clause of the First Amendment does not bar the Federal government from conducting activities on public lands which violate the Indians' religion. The court ruled that *Lyng* was controlled by its earlier decision in *Bowen v. Roy*, 476 U.S. 693 (1986). *Roy* held that a federal statute requiring states to use Social Security numbers did not violate Indian religious rights under the free exercise clause. *Lyng*, 99 L.Ed.2d at 545-49. In *Roy* the Court reasoned that an individual through the first amendment could not block the government's conduct of its own **internal** affairs; it found the government's use of a Social Security number for administrative, recordkeeping purposes to be purely internal in nature. In the Court's opinion legal disputes involving decisions by Federal land management agencies concerning land considered sacred to Indians were indistinguishable from *Roy*, involving nothing more than the government's **internal** affairs.

Justice Brennan, writing a stinging dissenting opinion joined by Justices Marshall and Blackmun, criticized as "remarkable" the majority's inability to distinguish the facts in *Lyng* from *Roy*. Brennan emphasized that Congress was well aware of the difference in 1978 when it enacted AIRFA:

> Federal land-use decisions, by contract, are likely to have substantial external effects that government decisions concerning office furniture and information storage obviously will not,. . . [AIRFA is] an express congressional determination that federal land management decisions are not "internal" government "procedure", but are instead governmental actions that can and indeed are likely to burden Native American religious practices. *Lyng*, 99 L.Ed.2d at 560-61.

Justice Brennan also noted that in *Roy* the government's recordkeeping system did not impair the **exercise** of one's religion; in contrast, construction of the G-O Road would impair the Indians' "freedom to exercise their religion in the greatest degree imaginable." *Id.* at 561.

2. The Supreme Court Rejected The Traditional "Effects" Test.

The Court in *Lyng*, however, did not stop there. As a second, alternative basis for the reversal it rejected what is known as the "effects" test, which essentially directs courts to assess the **effect** of government conduct on the religious free exercise rights of individuals. In Justice O'Connor's words:

> Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, *the location of the line cannot depend on measuring the effects of a government action on a religious objector's spiritual development*. *Id.* at 548.

The rejection of the "effects" test represents a significant departure from well-established precedent. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (a law is constitutionally invalid if its "purpose or effect" is to "impede the observance" of religion); *Waltz v. Tax Commission*, 397 U.S. 664 (1970); *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972); *Thomas v. Review Board*, 450 U.S. 707, 717 (1981); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. ____, 94 L.Ed.2d 190, 197 (1987).

In lieu of the "effects" test, the Court adopted a strained interpretation of the free exercise clause which limits the scope of cognizable free exercise claims against the government to circumstances of "coercion" or "penalty":

> individuals [would] be *coerced* by the Government's action into violating their religious beliefs; . . . [or *penalized* by being denied] . . . an equal share of the rights, benefits and privileges enjoyed by other citizens. *Id.* at 546 (emphasis added).

To further draw out the distinction between impermissible and permissible government action the Court provided the following elucidation:

> This does not and cannot imply that *incidental effects of government programs,* which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. *Id.* at 547 (emphasis added).

The Court necessarily had to attempt to articulate a principled difference between "indirect coercion or penalties on the free exercise of religion," and "incidental effects of government programs." Forms of "indirect coercion," the Court recognized in keeping with precedent, are subject to First Amendment scrutiny; "incidental effects," following *Roy* and now *Lyng*, are not. In other words, in the Court's view government actions which **compel** affirmative conduct inconsistent with religious belief are **coercive** and, hence, unconstitutional. But those government actions which "merely" **prevent** conduct consistent with religious belief are "incidental" and, thus not unconstitutional.

Citing the diverse nature of our society, and the possibility that **any** government action might offend the religious sensibilities of some individual or religious sect, the Court sidestepped these difficult cases and dumped them off on Congress. *Id.* at 548; cf. *id.* at 562.

In dissent Justice Brennan minced no words concerning the Court's rejection of the effect's test. Much of the text of this portion of his opinion is quoted at length to give the reader a full sense of the strength and persuasiveness of his reasoning:

> I thus cannot accept the Court's premise that the *form* of the Government's restraint on religious practice, rather than its *effect*, controls our constitutional analysis. . . [C]onstruction of the G-O Road . . . will virtually destroy respondents' religion, and will necessarily force them into abandoning those practices altogether. Indeed, the Government's proposed activities will restrain religious practice to a far greater degree here than in any of the cases cited by the Court today.
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> Ultimately, the Court's coercion test turns on a distinction between governmental actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief. *In my view, such a distinction is without constitutional significance.* The crucial word in the constitutional text. . . is "prohibit", . . . a comprehensive term that in no way suggests that the intended protection is aimed only at governmental actions that coerce affirmative conduct. *Nor does the Court's distinction comport with the principles animating the constitutional guarantee; religious freedom is threatened no less by governmental action*

> *that makes the practice of one's chose faith impossible than by governmental programs that pressure on to engage in conduct inconsistent with religious beliefs.*
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> * * *
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> Both common sense and our prior cases teach us, therefore, that governmental action that makes the practice of a given faith more difficult necessarily penalizes that practice and thereby tends to prevent adherence to religious beliefs. The harm to the practitioners is the same regardless of the manner in which the Government restrains their religious expression, and *the Court's fear that an "effects" test will permit religious adherents to challenge governmental actions they merely find "offensive" in no way justifies its refusal to recognize the constitutional injury citizens suffer when governmental action not only offends but actually restrains their religious practices.* *Id.* at 558-59 (dissent, footnote omitted) (emphasis added).

3. Unanimity and Certainty Required To Prove Indians' Claims.

Like the decision of the Forest Service to build the G-O road over the objections of the Indians **and** its own expert anthropologist, the Supreme Court's decision in *Lyng* is simultaneously offensive and paternalistic. Like the Forest Service bureaucrat, five members of the Court with Justice O'Connor as spokesperson found the Indians' claims simply too incredible to believe, notwithstanding the Court's own admonition that it is not in a position to "determine the truth of the underlying beliefs that led to the religious objections. . ." *Id.* at 551. Justice O'Conner decried the Theodoratus Report as "so sympathetic," and described it as constituting the Indians' primary evidence of religious infringement. *Id.* at 550. Such characterizations ignored the fact that much of Dr. Theodoratus' conclusions were derived from primary data drawn from interviews with scores of Indian religious practitioners.

Moreover, the Court conveniently seized upon what it thought was a *lack of unanimity* in the record concerning religious impacts, as a basis for discrediting the Indians' claims:

> To be sure, the Indians themselves were far from unanimous in opposing the G-O Road, see

> App. 180, and it seems *less than certain* that construction of the road will be so disruptive that it will doom their religion. *Id.* at 548 (emphasis added).

Two criticisms of the Court's reasoning are in order. First, free exercise precedent does not require **unanimity** of belief. *See, e.g., Thomas v. Review Board, supra*, 450 U.S. at 715 ("Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences . . ."). Second, where is it stated that proof of **certainty** of the destruction of one's religion is required as prerequisite to triggering the protections of the free exercise clause? The Court itself has noted that "sincerity" is the key inquiry here:

> If judicial inquiry into the truth of one's religious beliefs would violate the free exercise clause, an inquiry into one's reasons for adopting those beliefs is similarly intrusive. So long as one's faith is religiously based at the time it is asserted, it should not matter, for constitutional purposes, whether that faith is derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible. *Hobbie, supra,* 94 L.Ed.2d at 199, n. 9, *quoting Callahan v. Woods*, 658 F.2d 679, 687 (9th Cir. 1981).

In *Hobbie* the State of Florida attempted to argue that Paula Hobbie's claim to unemployment compensation for being hired to work on Saturday, her Sabbath, were unfounded because she converted to Seventh Day Adventist faith **after** entering into a contract of employment. One of Florida's purported interests was in preventing fraud on its unemployment compensation fund by individuals feigning new-found religiosity or spirituality. The Supreme Court rejected such a notion by an 8-1 vote. "The First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired." *Hobbie, supra*, 94 L.Ed.2d at 199. In clear contrast to *Thomas* and *Hobbie*, the Court in *Lyng* regarded the Indians' religious claims as inferior by imposing a higher standard of factual proof. Why the singling out of Indian religion for disparate treatment? The religious claimants in *Yoder, Sherbert, Thomas* and *Hobbie* absolutely could not have met such a rigorous proof standard.

4. The Supreme Court Rejected The Centrality-Indispensability Test.

In the decision below the Ninth Circuit Court of Appeals adopted what has become known as the "centrality-indispensability" standard: as a prerequisite to establishing a "burden" on religion under the first prong of the free exercise test Indians were required to prove that a physical site was **central and indispensable** to religious practice. The Ninth Circuit relied on earlier decisions in Indian sacred site cases from the Sixth Circuit and District of Columbia Circuit which interpreted the test as requiring Indians to prove that religious ceremonies were practiced at a particular site *which could be performed nowhere else*. *See Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); and *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 456 (1983).

Because the majority in *Lyng* denied the existence of Indians' first amendment rights altogether, it was unnecessary to discuss the propriety and functional utility of the centrality-indispensability standard. The majority, however, referred to the standard in response to Brennan's dissent, which criticized the Court for turning the "difficult task" of balancing "competing and potentially irreconcilable interests" over to Congress. *Id.* at ___. In *dicta* the Court rejected the centrality-indispensability standard as unworkable on the basis that it would require:

> . . . this Court holding that some sincerely held religious beliefs and practices are not "central" to certain religions despite protestations to the contrary from the religious objectors who brought the lawsuit. [This would have the effect] . . . of [requiring] us to rule that some religious adherents misunderstood their own religious beliefs. [This] . . . would cast the judiciary in a role that we were never intended to play. *Id.* at 552.

The dissenting opinion by Justice Brennan also rejected the judicially crafted centrality-indispensability standard:

> I believe it appropriate, therefore, to require some showing of centrality before the Government can be required either to come forward with a compelling justification for its proposed use of federal land or to forego that use altogether. *"Centrality", however, should not be equated with the survival or extinction of the religion itself. Id.* at 563 (dissent) (emphasis added).

Recognizing that, at their "most absolute," competing Indian and government claims are "fundamentally incompatible," Brennan argued for a legal standard which falls between absolute protection of all sacred geography and absolute destruction; one which tempers the disparate world views with compromise and mutual accommodation.

> Rather, adherents challenging a proposed use of federal land should be required to show that the decision poses a *substantial and realistic threat of frustrating their religious practices*. Once such a showing is made, the burden should shift to the Government to come forward with a compelling state interest sufficient to justify the infringement of those practices. *Id.* at 563.

In closing, Justice Brennan lamented the Court's "stripping" of Indians' constitutional protection against destruction of sacred lands:

> Ironically, the Court's apparent solicitude for the integrity of religious belief and its desire to forestall the possibility that courts might second guess the claims of religious adherents leads to far greater inequities than those the Court postulates: today's ruling sacrifices a religion at least as old at the Nation itself, . . . so that the Forest Service can build a six-mile segment of a road that two lower courts found had only most marginal and speculative utility. . . .
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> Given today's ruling, [the Indians'] freedom [to maintain their religious *beliefs*] amounts to nothing more than the right to believe that their religion will be destroyed. *Id.* at 563-64 (Dissent).

5. The Supreme Court's Interpretation of AIRFA.

By now the Supreme Court's interpretation of AIRFA in *Lyng* is well known; the same or similar conclusions regarding the Act having been reached in most reported lower court decisions. First, it held that AIRFA is but a statement of policy by Congress; the *Lyng* Court was of the opinion that the Forest Service could not have been "more solicitous" in respecting Indian religion and AIRFA policy. *Id.* at 550. (Again, to reach this conclusion the Forest Service had to ignore the expert testimony of its own witnesses.)

Second, the Court concluded that "[n]owhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights." *Id.*

Finally, the Court referred to remarks by Congressman Udall, sponsor of H.R. 1546, that AIRFA was but a "sense of Congress' joint resolution," that it confers on Indians no "special religious rights," and that in fact "has no teeth in it." *Id.* at 550-51.

After *Lyng* Indians need not worry about **special** religious rights: the effect of the *Lyng* decision is to strip them of **all** constitutional religious rights for the protection of sacred sites!

Concerning AIRFA, Justice Brennan made two points in dissent. First, as mentioned earlier, he recognized that Congress made express findings via AIRFA and its legislative history that the Federal government has left a legacy of persecution of Indian religion under the guise of "incidental effects." If the "incidental effects" of government actions are above constitutional scrutiny, that persecution will continue. Second, he described the Court's decision as making a "mockery" of AIRFA's policy to "protect and preserve for American Indians their inherent right of freedom to believe, express and **exercise** the[ir] traditional religions." *Id.* at 564.

6. The *Lyng* Court's Discussion Of Establishment Clause Issues.

The majority in *Lyng* reasoned that to accept the Indians' free exercise claims would amount to establishing a "religious servitude" on public lands, thereby divesting the government of its "right to use what is, after all, its land." *Id.* at 549. Such a servitude, which is perhaps hard to establish legally, very well exists **morally** and **ethically**. Justice O'Conner and the Court majority ignored the centuries old spiritual connection of Native people to the land, as if designating it as "government" property gave the United States license to sever this connection.[4]

In dissent, Justice Brennan, recognized that the Indians did not seek to exclude **all** human activity. Indeed, a number of environmental groups were co-parties to the litigation, an implicit recognition that certain non-religions of the high country are in fact harmonious with religious uses. Although in *Lyng* a case of **exclusive** Indian use was clearly not before the

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[4] The Indian Claims Commission never established a monetary value for the religious and spiritual uses of Indian aboriginal territory, nor were Indians ever so compensated.

Court; the specter of one certainly appeared to be. But only under those circumstances, in Brennan's view, might legitimate establishment clause concerns be raised. *Id.* at 562, 564.

D. H.R. 1546 And The Need For AIRFA Amendments.

1. Introduction

It has been a decade since AIRFA's enactment. With the passage of time, Indians and Indian advocates have become experienced in terms of AIRFA's strengths and weaknesses. Even before the Supreme Court's decision in *Lyng*, the results of various administrative and court battles have demonstrated the need to change AIRFA in several ways. Now, because of the *Lyng* decision, Indians must look to and rely exclusively on Congress to strengthen AIRFA to re-establish an equitable balance between Indians and the Federal government concerning land management matters.

Justice Brennan hit on the essence of the dilemma created by the majority's decision in *Lyng* when he noted that Federal bureaucrats have now been blessed with "unilateral authority to resolve all future disputes in [their] favor, subject only to the Court's toothless exhortation to be 'sensitive' to [Indian] religions." *Id.* at 562 (Dissent). Prior to the *Lyng* decision, Indians had the first amendment as a means of ensuring **some** measure of protection for their religions. After *Lyng*, Congress must now shoulder the responsibility the Court shirked, that of allowing a fair measure of "mutual accommodation. . . tempered by compromise." *Id.* at 563.

Congress, with power under the Indian Commerce Clause, Article I, §8 of the Constitution, and with virtual "plenary" authority over Indian affairs, can statutorily reinvest Indians with religious and cultural rights under AIRFA that heretofore were taken for granted as ***constitutional*** rights.[5] Religious diversity and free exercise are valid secular purposes of a constitutional democracy. Thus, contrary to the claims of some opponents, an amendment to AIRFA which fairly accommodates and insulates Indian religious free exercise from persecution by the Executive Branch of the Federal government does not run afoul of the establishment clause.

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[5] The Court implicitly recognized such a principle in the context of AIRFA in *Roy*, when it noted that AIRFA -- "with its emphasis on freedom to believe, express and exercise a religion -- accurately identifies the mission of the Free Exercise Clause itself." *Roy, supra*, 90 L.Ed.2d at 745.

2. Specific Comments Relative To H.R. 1546.

On March 21, 1989, Congressman Morris Udall introduced H.R. 1546, a bill to amend AIRFA by adding a new section 3 which incorporates three basic changes into existing law. First, 3(a) establishes as Federal statutory law the free exercise standard developed by lower federal courts in Native sacred site cases, *see, e.g.*, discussion of *Wilson v. Block, supra; Sequoyah v. TVA, supra,* with certain language changes to reflect the legal standard recommended by Justice Brennan in dissent in *Lyng*. It also adds the requirement that as a condition of protection, lands must "have historically been either part of, or necessary to, or been used by, a traditional Native American religion." Section 3(b) gives federal district courts the authority to enforce the new Act. Finally, section 3(c) states in general terms the respective parties' burdens in terms of law and fact questions.

As promised at the outset of this testimony, below is a point-by-point discussion of the key elements which NARF believes should be a part of any effort to amend AIRFA to restore the pre-*Lyng* balance to agency decisions and actions. These points reflect the efforts of a coalition of national Indian organizations--National Congress of American Indians, Association on American Indian Affairs, and Native American Rights Fund--to work with the Senate Select Committee on Indian Affairs to draft amendments to AIRFA as part of a larger omnibus Native Cultural Rights Bill, which has yet to be introduced. A copy of the AIRFA title to the Cultural Rights Bill is attached hereto as Appendix A.

a. "Notwithstanding Any Other Provision of Law. . ."

All Federal lands must be managed in such a manner so as not to violate the statutory protections afforded under AIRFA, as amended. The preamble to the 1978 AIRFA contained express findings which emphasized that AIRFA was necessary *for the very reason* that over the years Congress had enacted a number of laws, land management and otherwise, and federal land management agencies had implemented these laws through rules, regulations and policies, without *any* consideration whatsoever as to their effect on Native religions and religious practices. 92 Stat. 469-70. Examples of such laws include the Wilderness Act, the National Forest Management Act, the Multiple Use and Sustained Yield Act, the Federal Land Management Policy Act, Endangered Species Act and other laws. Since 1978 the original AIRFA has had ***no effect whatsoever*** on the agencies' interpretations of these laws and others, for the simple reason that Congress in 1978 did not direct them to change their way of doing business.

An example is the National Park Service's Native American Relationships Policy, published in the Federal Register on September 22, 1987, 52 Fed. Reg. 25674 (1987). A very well intentioned policy, from an agency largely committed to the preservation--as opposed to development--of lands under its jurisdiction. The stated purpose of the policy is to implement AIRFA by implementing and executing its programs "in a manner that reflects knowledge of an respect for the cultures of Native American tribes or groups. . . . " 53 Fed. Reg. at 35675. Notwithstanding, the Park Service stated expressly in the policy that Native uses of Park Service lands ". . . must be within the bounds of existing legislation as well as NPS rules and policies that implement legislative mandates to protect and preserve the system's resources, . . ." 52 Fed. Reg. at 35674. Similar restrictions appear throughout the policy.

NARF maintains that this mandate effectively nullifies the original intent and purpose of AIRFA. The loophole must be closed this time around.[6] Thus, henceforth, for AIRFA to affect the way these agencies operate, as it must if it is to provide any guidance and protection whatsoever, it must be made clear that these laws must be interpreted in such a way so as not to violate AIRFA, as amended. There are ways to harmonize the needs and interests of all diverse users of the public lands without sacrificing the legitimate rights of Native people.

b. Mandatory Promulgation of Regulations; Mandatory Consultation.

The AIRFA of 1978 did not require agencies to promulgate regulations to implement its directives. And no federal land management agency took the initiative to draft regulations to guide local office officials in their land management and decision processes. As a result, AIRFA is routinely criticized by agency officials as being "vague"; "pie in the sky"; and "meaningless" in providing any real assistance.

In contrast, Congress in the Archeological Resources Protection Act of 1979 required certain federal agencies to promulgate rules to implement ARPA. These agencies have done so. And as a result, when land management agencies encounter "archeological resources" on lands within their respective jurisdictions, they by and large understand their legal responsibilities and have in place administrative and policy means of implementing and executing those responsibilities. An analogous situation exists with respect to Section 106 of the National Historic Preservation Act of 1966, as amended. *See* 16

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[6] This is our main objection to Senator McCain's proposed AIRFA amendments, S. 1124, introduced on June 16, 1989, which would legislatively codify this loophole. *See* discussion herein.

U.S.C. § 470 *et seq*. Consequently, while land management agencies have ARPA and Section 106 "clearance" procedures, no such clearance process exists for AIRFA.

In the Summer of 1988 NARF conducted a survey of federally recognized Indian tribes and Alaskan Native Villages, concerning their experiences with the 1978 AIRFA and recommendations for change. We received approximately 50 responses. Without exception, AIRFA worked best only in circumstances where the villages and tribes had taken the initiative and forced federal agencies to implement it. In the majority of instances agencies made little real attempt, if any, to work out plans with tribes and villages to implement AIRFA. In many situations AIRFA was simply ignored by the agencies.

Most responding tribes and villages recommended mandatory consultation between the agencies and affected Native groups as the most important step in overcoming the ignorance of and non-compliance with the 1978 AIRFA policies. Also important was the need for agency officials to become sensitive to the world view and religious and cultural needs of their Native constituencies; in effect, to have a change of attitude. NARF believes that our collective recommendations for amendments can improve the level of AIRFA understanding and compliance, and help to foster better relationships and attitudes.

As a final point on this issue, consultation must be meaningful. It cannot be infested with loopholes which only breed mistrust, as is the Park Service's Native Relationships Policy: "*Native American Involvement* and Consultation: . . . [a]lthough final decisions in all cases shall consider the results of consultations, the authority and the responsibility for the decision rests with the services." Such agency policy reinforces the need for required records of all agency consultants and decisions, and the opportunity for *de novo* judicial review of final agency decisions. *See* discussion *infra*.

As a final note regarding consultation, NARF subscribes to the language and provisions of Section 5 of the attached draft Cultural Rights Bill. *See* Appendix A, attached hereto.

c. Required Agency Recordkeeping; Federal Court *De Novo Review*

We recommend that H.R. 1546 be amended to include the mandate (1) that agencies be required to maintain complete records of all land management decisions and other actions which will possibly impact Native religions and (2) that agency decisions be subject to *de nove* review by federal district courts.

The record keeping requirement ties in with a previous recommendation concerning consultation. Throughout the formal consultation process, agencies must keep thorough records of all discussions with affected Native groups. Minutes of meetings must be transcribed and comments solicited from such groups after the fact. The essential purposes are as follows. First, by requiring more attention to the details of the consultation process, as record keeping would accomplish, agencies and their key decision makers will be more familiar with the specific concerns and needs of the affected Native groups. A greater likelihood will develop that these decision makers fully ***understand*** and ***be sensitive to*** the needs of those affected by the proposed activity or decision. A major concern of Native groups which we polled last year was that agencies did not take the time to educate themselves as to the impacts of various activities on Native religious traditions and the exercise of those traditions. Requiring detailed records will not make insensitive agency officials more sensitive, but it will allow the development of a record to track the level of effort by officials to fully understand the ramifications of their decisions. Where agency officials fall short on their obligation to Native people, a record will exist of that shortfall.

The related justification for requiring complete records pertains to the role of court review of agency decisions and actions by aggrieved Native groups. *De novo* ("anew; afresh; a second time") review by federal district courts is particularly appropriate where matters of Native religion are concerned. Courts have held that, as a matter of administrative law, agencies are especially ill-equipped to make findings of fact and law in cases involving First Amendment religious free exercise rights. *See, e.g., Porter v. Califano,* 592 F.2d 770, 780 (5th Cir. 1979). In such cases the trial court sitting in review of an agency decision is obligated to examine that decision *de novo*, to conduct an "independent judicial factfinding," giving no particular deference to the agency decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Camp v. Pitts*, 411 U.S. 138, 141 (1973). The alternative is to provide no check whatsoever on otherwise unconstitutional and discriminatory conduct by agency officials. *See* discussion of *Lyng, supra;* Means v. United States, supra.

d. Legal Standards for Law and Fact Burdens.

We believe that H.R. 1546 is on the right track in terms of accurately representing the First Amendment religious free exercise standard developed by the Supreme Court over the years. We also endorse the adoption of Justice Brennan's standard (dissent) from *Lyng* to the effect that federal lands "shall not be managed in a manner that will pose a substantial and realistic threat to undermine and frustrate any traditional Native American religious practices."

We, however, believe that the legal and fact standards should also be expanded along the lines of those found in Section 6 of the attached Appendix A, draft of AIRFA amendments developed by the NCAI/NARF/AAIA working group. We believe that the Section 6 standards provide all players--Native groups, agencies and other Interests (developers, etc.)--with a clearer picture of the rules of the game. We are available to meet with the Committee and its Staff, agency representatives, and other interested parties to discuss these standards in more substance and detail.

e. Agency Confidentiality Provisions.

Section 7 of the attached Appendix A provides for the exception of agency records pertaining to Native religious practices (and other information shared with agencies by affected Native groups) from the requirements of the federal Freedom of Information Act, upon the request of the Native group. It also provides for the return of all records to the Native group upon completion of the consultation process and judicial review of agency decisions, etc.

These assurances of confidentiality at a minimum are necessary to foster the complete participation of Native groups in agency decisionmaking. It has been our experience that client groups are particularly apprehensive to release intimate details concerning their religious beliefs and practices to total strangers. It has been the legacy in the United States that once released from the particular culture the information has been abused and the cultures exploited, whether the initial release of information was to an agent of the United States government or to some other party. This has led to a lack of trust by Native groups; groups which are already frustrated with and suspicious of the existing federal administrative review process. Required confidentiality, with harsh penalties for violations thereof, would add a positive step toward building improved relations between Native groups and federal agencies and their officials.

Moreover, such FOIA exemptions are already provided for agency personnel and medical and other similar files, the release of which would cause harm or embarrassment to the individual. *See. e.g., Department of Air Force v. Rose,* 48 L.Ed.2d 11 (1977); *Whalen v. Roe,* 51 L.Ed.2d 64 (1977).

f. Attorney's Fees.

This amendment conforms to Section 9 of the attached Appendix A, and would conform AIRFA to existing federal law under the provisions of the Equal Access to Justice Act, which allows the award of prevailing parties' attorney's fees and costs against federal agencies under certain legislative and judicially articulated standards. This section would not expand the rights of Native groups *vis-a-vis* other litigants against federal agencies, in terms of the award of fees and costs.

E. Establishment Clause Concerns.

The Supreme Court expressed the sentiment in *dicta* in its 1988 decision in *Lyng* that what the Indians sought in that case might very well establish a "religious servitude" on federal public lands. Opponents to Senator Cranston's proposed bill to amend AIRFA last year raised the same specter--that of an absolute "veto" by Indians over decisions of federal land management agencies and officials. These claims, while perhaps superficially attractive, are little more than hyperbole.

In all but the most exceptional of circumstances Native groups have never and will never seek exclusive use of a land area for religious purposes. Neither the Indians in *Lyng* or in *Means* sought to absolutely tie up the sacred land areas they wanted to preserve and access. In *Lyng*, for instance, the record was clear that several of the Forest Service's espoused "multiple uses" would be fostered by preservation of the high country, including recreation, watershed protection, fishery habitat protection and enhancement, scenic values, as well as cultural resource protection. Similarly, in *Means*, the Sioux traditionalists who sought an application to construct Yellow Thunder Camp in the Black Hills National Forest did not seek to exclude recreationists or the grazing of livestock. Native groups usually find their interests in alignment with other ostensibly vital interests served by the preservation of the federal public land base, and out of alignment with those interests who would seek to exploit the natural resources for private profit. Not that private profit is *per se* bad or wrong--indeed our economic system thrives on it--but often the range of interests immediately served by private profit is narrow and not multi-dimensional. Such is not the case with respect to the other values with which Native interests are aligned.

As to a strict Establishment Clause analysis, we offer the following view. The Supreme Court has established a three-pronged test for establishment in the decision of *Lemmon v. Kurtzman*, 403 U.S. 607 (1971). To sustain challenge under the Establishment Clause, a federal statute must: (1) have a secular legislative purpose; (2) its primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster an excessive government entanglement with religion. *Lemmon*, 403 U.S. at 612-13.

H.R.1546, as we would propose to have it amended, has a valid secular purpose. Strengthening AIRFA to give it some teeth, especially after the Supreme Court's handiwork in *Lyng*, fosters religious plurality and diversity in American--the ultimate objective of the First Amendment. The promotion of cultural and religious diversity and freedom for Native peoples also serves broad federal land policies of multiple use. And because the preservation of traditional religions and cultures is an essential focus of the mission of Native governments, AIRFA amendments help fulfill the broad United States policy of Indian self-determination and the government-to-government relationship between the U.S. and Native governments.

Importantly, AIRFA amendments foster and promote the 1978 AIRFA policies, which the past decade record makes clear have never been fulfilled. A "mid-course" correction in AIRFA is warranted by the past decade of continued ignorance, insensitivity and abuse of Native religions. Moreover, Native religious groups would not be given preferential treatment in the use of federal lands under a new AIRFA. The legal and fact burdens and standards built into the bill would insure only a fair balancing between the needs and interests of Native peoples and the government, a "fair accommodation" in Justice Brennan's view.

Our view concerning the second *Lemmon* test is equally straightforward. H.R. 1546 or similar efforts to amend AIRFA would likewise have a primary secular effect. Our country's religious free exercise jurisprudence is built on a foundation of **accommodation**, recognizing that accommodation must vary in kind and degree if we are truly to be a diverse, plural religious society. Accordingly, the primary **effect** of AIRFA amendments would be to remove federal impediments to Native religious practices; i.e., to allow Native religious practices without interference. *See, e.g., Corporation of Presiding Bishops v. Amos,* ___ *U.S.* ___, 107 S. Ct. 2862 (1987). In light of the ten year history of continued infringement of Native religion notwithstanding the 1978 AIRFA, and now *Lyng*, the situation becomes ever more compelling.

Finally, we tackle the question of "excessive entanglement." To be sure, because of the nature of Native religions, as land based, and because of the federal "ownership" of lands upon which Native sacred sites are located, there will undoubtedly be some government involvement in Native religion under any scheme to amend AIRFA. Chairman Udall in the original AIRFA debates recognized that if Christian sacred sites or holy places were located in the United States and not in the Middle East, our laws would no doubt protect their integrity and sanctity.

Lemmon counsels us to look at the "character and purposes of the institutions which are benefitted [by the statutory entanglement], the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority." 403 U.S. at 615. Two important points follow. First, Congress can ground legislation in the area of Indian affairs which results in "special treatment" in its unique obligation to Indian people. *Morton v. Mancari*, 417 U.S. 535 (1977). The 1978 AIRFA establishes an unambiguous, unique obligation to Native people in the area of religious freedom.

Congress can legitimately and safely enact AIRFA amendments under the authority of Article I, Section 8 of the Constitution--the Indian Commerce Clause--as a vehicle for fulfilling its obligation to protect and preserve religious freedom for Native people, thereby insulating it from challenge under Establishment principles.

Second, because of the "minority" nature of Native religions, there is little fear that the resulting relationship between the federal government and Native groups will be the first step in an inevitable progression leading to the establishment of state churches and state religion. 403 U.S. at 624. There is no likelihood that the "downhill thrust" warned of in *Lemmon* will create a self-perpetuating and self-expanding governmental program impinging on the Establishment Clause.

Finally, as a generally accepted principle, religious free exercise does not run afoul of the Establishment Clause. *See, e.g., McDaniel v. Paty*, 435 U.S. 618 (1978).

F. Comments Concerning S. 1124, Senator McCain's Proposed AIRFA Amendments

On June 6, 1989, Senator McCain of Arizona introduced S. 1124, a bill to amend the 1978 AIRFA. We would offer the above comments concerning any effort to amend and expand AIRFA. Of particular concern is one provision of S. 1124 which would exempt any decision of federal agencies from AIRFA where "necessary to carry out legal responsibilities of the Federal Government, . . ." As noted earlier, this loophole essentially swallows the very intent and purpose of AIRFA amendments, and perpetuates the insensitivity and abuse of the past decade.

G. Conclusion

The Supreme Court in *Lyng* produced what Justice Brennan described to be a "cruelly surreal result. . . [where] governmental action that will virtually destroy a religion is nevertheless deemed not to 'burden' that religion." Slip. Op. at 14 (Dissent). H.R. 1546 represents a critical first step to raise Indian religion "like the Phoenix from the ashes" of the *Lyng* decision. Thank you for this opportunity to share my views on *Lyng* and H.R. 1546 with the Committee.

A PRELIMINARY ASSESSMENT OF THE SIGNIFICANCE OF NAVAJO SACRED PLACES IN THE VICINITY OF BIG MOUNTAIN, ARIZONA

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under contract

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INTRODUCTION

The following report was prepared under contract between the authors and the Navajo and Hopi Indian Relocation Commission, United States Department of the Interior.

In compliance with the terms of the contract the following pages will present the results of a preliminary inquiry into the possibility of there being substantial religious significance associated with the shrines, land, and medical practices found in an area of the former Joint Use Area known as Big Mountain. It includes, further, a determination of the need for a more detailed comprehensive study to fully ascertain religious significance.

BACKGROUND

The study area of Big Mountain is located in the vicinity of the geographic feature named Big Mountain and Moenkopi Wash, in the northern part of Hardrock Chapter. Hardrock Chapter is one of 13 chapters that transect the former Joint Use Area, and one of 101 such political units functioning in the Navajo Tribal Government.

With the enactment of the Navajo-Hopi Land Settlement Act (Public Law 93-531) some residents of Big Mountain have assumed a position of resistance. This resistance is grounded on a perceived infringement of the people's rights and interests as they pertain to the Big Mountain area. A number of processes associated with Public Law 93-531 seem to account for this perceived infringement.

First, the Mediator's settlement and partition of the lands within the reservation established by the Executive Order of 1882 positions the

Big Mountain area on the Hopi side of the boundary line. A brief review of the history of negotiations surrounding the partioning of land in the area suggests that in every determination the Mediator accepted the recommendations of the Navajo Tribe. ...

There are numerous Navajo sacred places distributed throughout the Big Mountain area. The concern of residents is that these sacred religious places have not been given full recognition by government officials, either Navajo or Federal. The map of Navajo sacred places presented for exhibit in the case of Healing vs. Jones identifies only two sacred places in the 1882 Executive Order Area. Subsequent court submissions by the Navajo Tribe have increasingly recognized these places. However, as late as 1975, during the negotiations involving the partition line, the maps that were presented did not include herb gathering areas. The last site identifications submitted before the District Court on May 13, 1977, are far more comprehensive, yet some sites still remain unidentified.

Federal recognition, legislative treatment, enforcement procedures, and administrative policy directives also have been limited with respect to sacred places. This limitation may be a result of failing to perceive what constitutes Navajo reality of sacredness of place. Although variation does exist, it would seem that there is a symbiotic relation between belief, place, participation through use, and occupancy. To segment this interdependent relationship by allowing only for access to a sacred location is to subtract occupancy, and, perhaps, a degree of participation through use. A clear example of this segmenting process exists in the case of Healing vs. Jones. Here visitation to special religious places was recognized, but the court found that this in no way constituted occupancy nor did it establish exclusive interest in these places. This position seems to sever the links between the parts which consitute the symbolic sacredness of place and, therefore, the right to preserve the integrity of such places. However well intended, it appears that this position is an implicit infringement upon the exercise of free religious belief and meaningful spiritual observance. Big Mountain residents have been resistant in part because they perceive these conditions and positions as being restrictive and precluding their basic human rights as set forth by law.

Second, with the passage of Public Law 93-531 the Secretary of the Interior was authorized and directed to reduce the number of livestock within the former Joint Use Area to the carrying capacity of the land. The implications of the livestock reduction program for the social, economic, and psychological life of the people from this area have been documented (Wood, Vannette, and Andrews 1978). For the person of Euro-American descent, it may be possible to conceptually segment (for purposes of research or policy management) the issue of livestock reduction from say, the issue of relocation, but such is not the case for many residents of the change area; the encounter with Bureau of Indian Affairs personnel over fencing at Big Mountain is a case in point. This resistant encounter and the reasons given for it are perceived as interrelated with and inseparable from the more generalized position of resistance to the concept of relocation.

Expressions of resistance to relocation have assumed a number of forms. One form has been the physical overt resistance associated with the isolated and somewhat spontaneous fencing incident. Related to this have been the occasional threats directed at government workers and reports by relocation personnel that in some instances they have been "chased-off". Another form of resistance has evolved with the formation of an organized representational group — the Keep Big Mountain Area Planning Committee — as a tool for expressing their grievances and concerns.

Both as individuals and in some instances through committee, members of the community have stated their position and perspective on the issues through verbal address and discussion. This approach is evidenced in the numerous meetings and informal gatherings with officials from the Washington headquarters of the Bureau of Indian Affairs, with several United States Senators, Navajo Tribal Officials, local United States Government personnel, and with the Press.

Finally, some residents of the area have sought to express their beliefs and intentions through organized peaceful demonstration. Two marches of particular note are The Longest Walk to Washington, and The Big Mountain Walk for Sovereignty to Flagstaff.

At one point Chairman Peter MacDonald identified the Big Mountain situation as explosive (Navajo Times, June 1, 1978) and at approximately the same time relocation personnel publically implied that people from this area were uncooperative (ibid). These impressions, formulated by external observers, and the apparent diversity of strategies that members of the Big Mountain community have employed to convey their concerns have raised an important question: Is there particular particular importance associated with land use, medical practices, and shrines found in the Big Mountain area?

In an attempt to answer this question, the Navajo and Hopi Indian Relocation Commission on December 21, 1978, contracted with Northern respondents. Additional statements were received from ten individuals interviewed by relocation personnel. A detailed accounting of the individuals interviewed by sex and birthdate along with the interview occasion or information source appears in Appendixes 1 and 2.

THE QUESTION OF SIGNIFICANCE

The significance of place in the reconstruction of Navajo religious philosophy to be presented below lies in relationships to the whole, and ordered, all-inclusive unity. From the perspective of people in an area such as Big Mountain, the significance of place is more direct. People have ties to place in terms of ancestral use-rights, familiarity, and the specific locations of places where prayers and offerings are made for their well-being.

Euro-American views of significance are more segmental and analytical, at least as they are represented in the legislative arena. There are relatively few successful cases involving the question of the religious significance of Native American lands. The recent case of Taos Pueblo's claim to Blue Lake is perhaps the most comprehensive and revealing in terms of testimony.[1] We mention this case here because questions raised in the testimony are clues to admissible indicators of the significance of sacred places. Our interpretation of these questions and testimony may be summarized in the following unordered list of indicators. An unqualified indication of significance is signified by a "yes" or "no" answer to the question.

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[1] Hearings Before the Subcommittee of the Committee on Interior and Insular Affairs, U. S. Senate, 91 Cong., 2nd Session, July 9 and 10, 1970.

- Is there a symbiotic relationship among land, religion, and people that represents an important attachment to the land, and are there sacred places in use today that symbolize this relationship? Yes.
- Does the place play an important role in the origin myth of the people? Yes.
- Can shrines or places of offering be moved or relocated? No.
- Has the area been used for a long time, continuously, and frequently? Yes.
- Do people today feel as they have in the past toward the sacred areas? Yes.
- Does the area symbolize unity and continuity of the people? Yes.
- Do ceremonies and rituals "bind" people to the specific locations? Yes.
- Can the ceremonies and rituals be carried out elsewhere? No.

This list of indicators will serve as a point of reference in subsequent discussion following a brief review of the concept of place in Navajo religion and the data on sacred places in the Big Mountain vicinity.

NAVAJO RELIGION AND THE CONCEPT OF PLACE

Navajo religous acts and attitudes are not as compartmentalized as are the religious acts and attitudes of many Euro-Americans. In Reichard's words: "...it is religion which integrates all phases of Navajo culture..." (1944:2). But Navajo religion is not monolithic and immutable. There is variation in religious knowledge and belief, and the full impacts of Christianity and the Native American Church remain to be seen.

The following are only some of the principal themes in Navajo religion; themes that are abstracted mostly from summaries by Leland C. Wyman and Gladys A. Reichard to provide a context for discussion of the Big Mountain area.

According to Wyman: "The core of Navajo religious philosophy is the belief that the universe is an orderly, all-inclusive, unity of interrelated elements in which the principal of reciprocity governs man's relations with these elements, which include other men" (1975:4). This order and the rules by which man lives were established by the gods and Holy People.

> Improper contact with inherently dangerous powers — even though it be indirect, unintentional or unconscious — or the breaching of traditional restrictions (taboos) may lead to illness, the price man pays for disturbance of the normal order, harmony, or balance among elements in the universe (Wyman 1975:5).

Restoring and maintaining harmony (blessing), exorcising evil, and protection from danger are accomplished in ceremonies that are mostly curative (except Blessingway), occasional, and personal, and through prayers and offerings. These rites, ceremonies, and prayers and offerings were also established by the gods and Holy People.

There are no priesthoods or religious societies. Expert knowledge of the ceremonies -- their mythological charters as well as their performances -- is held by persons known as chanters or singers. Individual chanters may have expert knowledge of from one to five or six ceremonies of an active number of somewhere around twenty. Frisbie and McAllester (1978:1) estimate that there are only three or four hundred chanters on the entire reservation today. There are also persons who have the ability to diagnose and divine through hand-trembling and crystal-gazing, and some persons have detailed knowledge of the use of plants for healing and in ceremonies. Chanters, too, may have this knowledge. Additionally, "...almost every adult man and numerous older women know and perform shorter rituals taken from a repertory of prayerstick cuttings, jewel and pollen offerings and 'short sings' ..." (Frisbie and McAllester 1978:1).

Supernatural power is immanent in nature. "Animals, plants, mountains, and many natural phenomena are endowed with power. Even the seemingly most insignificant of these are indispensable; all are interdependent, being complementary parts of the whole. Animals and plants are conceived as capable of assuming human form at will, mountains have anthropomorphic inner forms, ..." (Wyman 1975:8-9, emphasis ours). Partly because of the immanence of supernatural power, the pantheon of gods and Holy People is vast and complicated. "Factors that (further) complicate the picture are the equivalence of beings appearing under different names or as various actors in the myths, the multiplication of dieties in time and space, (and) duplication of functions among the different dieties..." (Wyman 1975:8, parentheses ours).

"Place symbolism", as Reichard (1944:26) calls it, is central in Navajo religion. The mythical charters of most chants or sings have lists of place names visited by the heros of the myth. And, origin myths are full of references to place. This geography is largely mythical and symbolic, but it is usually tied to physical place. The geography of the present world, for example, was duplicated in the previous underworlds, and mythological explanations account for the origin of geographic features as well as the rules which govern man and the universe. Names for places in myths are relatively consistent, but [illegible] there is lack of agreement concerning their physical locations. In addition to the symbolic nature of place, this variation may be the result of chanters' and others' identification with their own localities (Reichard 1944:26), as well as a reluctance to specify exact locations for fear of losing power (Fishler 1953:92).

Finally, there is uncertainty about foreign territory; it is unfamiliar and "uncontrolled". When setting out on a journey or while traveling, prayers and offerings are more frequent (Reichard 1944:16). Reichard has proposed that certain symbolism in Navajo ceremony represents a protective line or danger line behind or within which one is protected by ritual. She further suggests that a "...belief in the danger line explains the more urgent need for prayer when a man travels since he may inadvertently cross it and he knows not what dangers lie beyond" (1944:17).

SACRED PLACES IN THE BIG MOUNTAIN AREA

THE NATURE OF SACRED PLACES

The question of significance has been addressed, but the definition of "sacred place" has been delayed until now because in our view a basic understanding of the role of place in Navajo religion provides the necessary context. We have seen that the belief in immanent supernatural power in nature and the geographization of that power are pervasive sentiments in Navajo religious philosophy. In the spirit of this view, Editha Watson has defined a Navajo "Sacred Place" as:

> 1) a location mentioned in le[illegible] [illegible] place where something supernatural has [illegible]: 3) a site from which [illegible] herbs, minerals [illegible] possessing healing powers may be taken [illegible] man communicates with the super[illegible] of prayers and offerings" (1964[illegible]).

These kinds of locations are not mutually exclusive. A place where something supernatural happened is often mentioned in legend; plants, waters and minerals collected there may have healing powers; and prayers and offerings may be made at the same legendary place for many purposes. On the other hand, different places, and the same places at different times may require different religious acts and provide different benefits.

Typical places for prayer and offering are prominent or unusual geographic features, springs, and places where medicinal and ceremonial plants grow.

The use of sacred places is not limited to chanters and other specialists, although only they may have the knowledge to use certain sites in the correct manner. Knowledge is the limiting factor. If a person knows the prayers and offerings appropriate to a place and action, he may make them. Many adults have this knowledge and make use of it as it is needed.

Offerings usually include corn or other kinds of pollen, or jewels (chips of white shell, turquoise, abalone, and jet), or prayersticks, or perhaps some combination of these. Prayers appear to be passed from generation to generation, in form if not in content; but, there is very little available information concerning prayers except in ceremonies.

Plants and herbs have a special place in Navajo culture as medicines of a supernatural sort and in an apparently vast practical pharmacopoeia. Certain plants or herbs must be collected from special places at certain times, and prepared in a special way. Plants, like other natural phenomena, are said to have an "inner form" (Haile [illegible]), and the collector of a plant for medicinal purposes must make a covenant with the plant through prayer and offering (see, for example: Wyman and Harris 1951:14; Luckert 1975:54-58; and Luckert 1978:73-80, 174-175).

THE STUDY AREA

The study area defined for us by the Navajo and Hopi Indian Relocation Commission (NHIRC) includes parts of six U. S. Geological Survey 7.5 minute quadrangles (55SW, 54SE, 55SW, 77SW, 77NE, 78NW in the notation used in the 1882 Executive Order Reservation) lying within the Hopi portion of the former Joint Use Area, in the northern part of Hard Rock Chapter. More specifically, the area lies between (and includes) Big Mountain and Moenkopi Wash in these quadrangles.

A list of Navajo sacred or religious areas on the Hopi portion of the former Joint Use Area shows a total of eighty localities of which nineteen (23.8%) are in the quadrangles which include the study area (excluding Black Mesa).[1]

The maps provided by the NHIRC show fifteen localities from this list, nine that are not on the list, and two archeological sites. Other information sources gathered by the NHIRC from people in the Big Mountain area indicate that there may be even more localities of potential significance.

The data we have for most of these locales are spotty, not comparable, or non-existent. The most complete information, relatively speaking, is for Big Mountain itself. The intent of the following sections is to review the data before turning our attention to a tentative evaluation.

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[1] The list is the Navajo Tribe's submission (May 13, 1977) regarding identified religious shrines in the case of Sekaquaptewa vs. MacDonald, in the United States District Court for the State of Arizona. No. Civ. 579 PCT (JAW).

BLACK MESA

Big Mountain is the most prominent feature in the heart of Black Mesa, and Black Mesa in its entirety is sacred, "...equally sacred as the four sacred mountains of the Navajo people".[1] Both Black Mesa and the Lukachukais are said to have the forms of persons (Klah 1942: 64-65; Watson 1964:9; Luckert 1978:48; (25)).[2] Black Mesa (Black Mountain) is female (7), and the Lukachukais are male (25); Watson 1964:9; Luckert 1978:46). One of the persons interviewed identified different geographical features as parts of her body (5). The roles of these two persons in Navajo mythology is not indicated in our data, but Watson says that the Sky Supporters stand on the summits of these figures (1964:9).

Black Mesa and the 1882 Executive Order Reservation contain many places considered sacred by the Navajos and Hopi, judging from the lists and brief descriptions provided to the courts by both tribes; however, it is not possible to assess these in relation to Big Mountain without further information.

BIG MOUNTAIN

On Big Mountain there is a circular stone foundation about twenty feet in diameter with a cubical structure of stone in the center and an opening or "doorway" to the east. The structure represents a hogan with the center as the focal point. The structure is said to be very sacred to the people of Big Mountain and surrounding area — the center, which is the shrine, is said to be the holiest place on Big Mountain. When offerings are made, people enter from the east and go clockwise (sunwise) to the center to place offerings in the cubical structure. The hogan is the home of Be'gochidí and Begołtsooí, the Holy People who had livestock (6).[1] The place is also the home of livestock (5).[2]

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[1] Notes for site 61 (Black Mesa) in the list of Navajo sacred places on the Hopi side of the partition line referenced previously.

[2] Numbers in parentheses are citations keyed to the list of interview occasions or information sources for this project reproduced in Appendix

In a statement for the Big Mountain Committee, Big Mountain is referenced as the home of "Bee'oochidí (God of Species)" (1). In another interview it was stated that Big Mountain is in the shape of a man whose name is Begochidi Hastiin — "He is the one that created man" (26). The shrine was built by the Holy People (23,24), and the story of it goes back to the Emergence (24). Begochidi is also associated with the moon, but the association was not clear from the interview (23).

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[1] The entire paragraph is paraphrased from occasion (6). The names were transcribed by the staff of the NHIRC as Begochi(e)dii and Begotsoii respectively. In our interviews, when the former was mentioned, it sounded like Be'gochidí in the Young/Morgan orthography. Begochidí is the transcription in Haile (1978:141). Henceforth, we shall use Begochidi for the sake of convenience. The second name is written here as Begołtsooí since, from the context and the transcription, it appears that the Bego-who-is-yellow is intended (see Haile 1978:141).

[2] It is not clear from the transcript whether the home of livestock is the general area or whether the reference is to a hole (dug-out) mentioned in (5) as being in the cubical structure.

Thus the people of Big Mountain consistently identify Big Mountain as the abode of a Holy Person, Begochidi, who is mentioned as the creator of man; the keeper of livestock; the god of species; and who is associated with the moon. There is a sacred shrine on Big Mountain representing the home of this Holy Person, and livestock. Legends and myths were not obtained, possibly because the people who were interviewed did not know them (this kind of knowledge is usually known in detail by chanters), or possibly because they did not want to tell them. However, Begochidi is mentioned frequently in the literature of Navajo religion, and perhaps some indication of the roles of Begochidi can be assessed through a brief review of some of the citations.

Begochidi is an enigmatic figure in Navajo mythology. Not the least of the enigmas is the frequent reference to Begochidi in association with other "Begos". The shrine on Big Mountain is described as the home of Begochidi and the Bego-who-is-yellow. This association is rather common. In many myths, however, there are four Begos -- Begochidi, Bego-who-is-white, Bego-who-is-Black, and Bego-who-is-yellow. In Frank Goldtooth's version of the Creation myth, Begochidi is identified with "Bego Yellow" and another Bego, Bego Blue, is added to the list to make four (Fishler 1953:11). A clue to the frequent association of Begos is found in Slim Curly's version of the Mothway myth: "By a change of colors, the (same) haze moved about with him (Begochidi), they say. The same person they called 'Bego-who-touches', 'Bego-who-is-white', 'Bego-who-is-black', 'Bego-who-is-yellow', they say" (Haile 1978:83-84, second parentheses ours). Thus, Begochidi apparently traveled in hazes of different colors. The essential identity of the four Begos is mentioned also in Wheelwright (1949:57).

Begochidi is described in vague terms, like "the blue-eyed, yellow-haired god" (Klah 1942), or simply as very old (Matthews 1897:226). Matthews says that Begochidi is not represented by masked impersonators, or by pictures in dry-paintings (p.226). Included among the varying identities of Begochidi are: the god of the Mexicans, or Americans; the moon carrier; the creator; a divine hermaphrodite; the custodian/creator of domestic animals, or game, or both; and many others (see Luckert 1975:176-177).

In Hosteen Klah's much-cited Creation myth (1942), recorded by Wheelwright in the 1930's near Newcomb, New Mexico, Begochidi was the primary moving spirit behind all creation, although he acted in consultation with other Holy People. And, after everything is created in the myth, "Begochiddy goes up into heaven where he remains" (p.16).

Closer to Big Mountain and more recently, Fishler (1953) has recorded a Creation myth told by Frank Goldtooth near Tuba City, Arizona, in which Begochidi plays an important, though somewhat more restricted role in the events before emergence into this world. The creator is "Supreme Sacred Wind", and the parents of the four Begos, including Begochidi (Bego Yellow), were Ray of Sun and Daylight.[1] Begochidi created the mountains. The first was Black Mountain which was laid out with the moon.[2] Then he created insects. The four Begos made beans, and created birds and game. Begochidi created and planted cotton.

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[1] The identification of Begochidi as the son of the sun is found in other legends (e.g. Wyman 1970:244; Wheelwright 1949)

[2] The location of this mountain is unclear.

The other gods made domestic animals, but Bego Black had to show them how to make them come to life. People were created by Supreme Sacred Wind. Begochidi is further responsible for the "Basic Law" of increase in animals. After the Emergence, Begochidi wanted to plant some of the things he had created and planted before, but the gods would not let him. There is no indication of what happened to Begochidi. Goldtooth would not reveal the names and locations of the gods since he believed he would lose power as a chanter (Fishler 1953:92).

Begochidi in the Mothway myth of Slim Curly (Haile 1978) assumes yet another apparent identity. Here Begochidi was given to touching the crotches of the Butterfly People, and to disturbing hunters and persons enganged in sexual intercourse in the same way. The Mothway myth itself is a rationalization of the relationships between brothers and sisters.

Begochidi appears also in several versions of Blessingway, which is commonly regarded as the backbone of Navajo ceremony (Wyman 1970). He appears as a custodian of horses and the sponsor of domestic animals. In Slim Curly's version, sheep and goats were created by Changing Woman. She gave the following instructions concerning how to live with sheep and goats:

> 'You must plead for them with Begochidi whom the sun never leaves, who time and again transforms into sunlight, into wind, who is found absolutely everywhere", she said to them. (Wyman 1970:246).

River Junction Curly said that: "The four [illegible]chidis put down that which would be the wanderers. They made [illegible] people. They all wore hats. He also made cattle, also burros" (1970:676). The places associated with the Begochidis, such as "Wide Horizontal Belt", "Dwarf Wide Horizontal Belt", and "White-clay-comes-down", are not further identified.

Finally, Luckert (1975:176-177) thinks that Begochidi is one of three major Navajo hunter gods, because of Begochidi's role as a tutelary creator in several of the huntingways, and that the roles and identities of Begochidi have changed historically.

The many identities of Begochidi are bewildering, but not surprising given the nature of Navajo religion. However, there appears to be a common theme in these myths and legends: that Begochidi is a generative principle (and principal), especially in relationship to animals.

The only citation that could be found in the literature concerning the nature of communication between man and Begochidi is Changing Woman's statement quoted previously: "You must plead for them (sheep and goats) with Begochidi..."(parentheses ours).

The shrine at Big Mountain is used on special occasions (23,25). Prayers and offerings are made for well-being (23,24), livestock (5,7, 23,25), crops (7), people who are away (7), spiritual guidance and thanksgiving (24,25), and requests for something (24). It is used in spring when the plants start to grow (23,24,25) and in the fall when plants (corn) are ripe (after harvest)(24,25). The shrine is used at the suggestion of a chanter, because of dreams (23,25), or because one wishes to make an offering there (25,26). If a person knows the prayers he does not have to use a chanter (24,25,26), but one may request a chanter to do the prayers (25).

Two persons mentioned that they had had a ceremony at the shrine in their childhood (7,23), and one person said that he had used the shrine several times in his lifetime (9). The most recent use was five days prior to the interview (24). When asked about the frequency of use, B said that once in a lifetime might be enough if one follows the spiritual way, but one might go as often as once a year (25). The shrine is also used by persons from outside of the area (Tuba City and Kayenta, for example)(5,23,24).

All of the points made about Begochidi by persons in the study sample can be duplicated in the cited myths and legends. The localization of Begochidi in Big Mountain and mention of the shrine, however, cannot be found in the extant literature. The silence of the literature on this point is not at all surprising. People are reluctant to name and locate sacred places.

Big Mountain is also an important place for collecting medicinal herbs and plants used in ceremonies. In the Navajo list of sites submitted to the court, in reference to the entire length of Big Mountain it is stated that: "*Every Navajo ceremony* requires herbs from this location. *Big Mountain is the major source of medicine*" (emphases theirs). Medicines at Big Mountain are emphasized in several interviews with and statements by residents of the area (1,8,23,24).

On one occasion (8) a large number of plants were identified and their uses explained. It was also explained in this interview that herbs are collected in certain places at certain times. Many uses for plants of the area were given by K (a diagnostician and herbalist (24) . She said that she collects herbs for chanters from the area when requested; that plants must be collected with set procedures;

and the area is the only spot where certain herbs grow. In addition, reference was made to use of plants from Big Mountain by persons from other places (23,24).

There is no indication in our data or in the literature that the special nature of Big Mountain as a place for collecting medicines is due to the presence of Begochidi; however, such a relationship is a distinct possibility.

There are two other explicit references to "sacred places" on Big Mountain in the Navajo submission of sacred places, and a third reference that can be identified as being at Big Mountain with the help of a statement prepared by the Big Mountain Committee (1). Of the two explicit references, the first is a location for prayers and offerings for children, livestock, and other blessings; the second is for prayers for rain and to stop strong wind. The third site is used for offering during Beautyway and for prayers for rain and blessing.

OTHER PLACES OF POTENTIAL SIGNIFICANCE

Fifteen sacred places or religious areas not mentioned previously are located within the study area according to the Navajo Tribe. Most of these are found west of Big Mountain, toward Moenkopi Wash, and most are springs. Prayers and offerings for rain, blessing and well-being are common uses of the sites; but use ranges from prayers and offerings for a safe journey to collecting medicinal herbs and trapping eagles for feathers. Four sites are used in connection with Beautyway. Medicine men (chanters) or medicine men and their patients are cited most frequently as the persons who use the places.

Several additional places are mentioned in the same general area in the interviews and statements collected by the NHIRC. And, their uses are similar.

About a dozen more localities, again, mostly springs, are cited as sacred places by persons living in the northern part of the study area (15,16,17,20,21). With the exception of three sites, there is no specific information about these places. The three sites are at springs. One has three or four pictographs said to represent yé'ii (Holy People) (17). The person interviewed did not want to name the pictograph panel, "because I have respect for it". However, she said that there was a dance (in the past) and the yé'ii went into the rock. One of the remaining spring sites has a place for offerings and prayers for bad dreams and bad luck. The other site is said to be used by medicine men to wash their patients.

The interpretation of these places and how they fit into the larger picture, if indeed they do, is seriously hampered by a lack of data. This lack of information is lamentable, since we suspect that the holistic perspective mentioned as important for our understanding of the Navajo view of significance may lie in how these places, Big Mountain, land use, and occupancy mesh, particularly at the local level.

OCCUPANCY IN RELATION TO SACRED PLACES

The intent of Public Law 93-531 in guaranteeing access to and use of sacred places is clear. The question of the right of occupancy would seem to be beside the point now. And, according to court findings in the case of Healing vs. Jones, the presence of sacred places in an area does not establish the right of occupancy. Yet, we would argue that to understand the point of view of the residents of the Big Mountain area, and perhaps other Navajos on the Hopi side of the partition, the question must be re-opened.

There are no definitive answers to the question in the meager information collected from the residents of the Big Mountain area thus far, but there are some scattered references concerning the relationship of occupancy to sacred places that are suggestive.

The majority of the sacred places elicited in the study area are water sources, usually springs. Also, water and rain are frequently mentioned in the comments of people interviewed at these and other sites, and in people's prepared statements. Water for human consumption, livestock and crops is a critical resource subject to fluctuation in this area, as it is elsewhere in the Southwest. We do not have any figures for this population, but for the former Joint Use Area as a whole in 1977, livestock income alone accounted for over one-quarter of the total aggregate income of a probability sample of 146 households (Wood, Vannette, and Andrews 1978). A significant part of this income was from livestock sales in the reduction program associated with Public Law 93-531, but there is some evidence that prior to reduction there was a comparable income figure for livestock, with home consumption accounting for a large share. Few economic questions were asked of the people in the study area, but it is our impression that subsistence is still, or was before the current stock reduction, a major factor in the local economy, especially for persons over 30 or 40 years old. Thus, the relationship of water to land use is, we think, still important.

There is some suggestion that social organization is a crucial part of this relationship in the Big Mountain area. About one-half of the persons interviewed comprise a set of close relatives, in a biological sense as well as the social sense of being members of the same clan. These people apparently have ancestral claims to the use of the land at the southern end and the eastern margin of Big Mountain, and the lands on the flats west towar[illegible]enkopi Wash. Several members of what seems to be a similar kin-ter[illegible]orial unit who occupy lands to the north were also interviewed. There were a few others interviewed whose relationships to these people were not ascertained. The lists of sacred places elicited are remarkably consistent within but quite different between these two "groups", with the exception of Big Mountain itself, which is consistently identified as important.

Prevalent themes in the interviews that concern land use are: the Navajos have been in the area since the Emergence; the land and waters were used by their grandparents and parents who taught them their use; and their grandparents and parents are buried in the area. For these reasons, and others, they do not want to leave. The ancestors of members of these two groups (and probably others) established the present use-rights to grazing area, farm plots (?), and water sources, as well as the pattern of land use. The differences in the lists of water sources, then, are explicable in terms of the history of use-rights. These links among water, land, and social organization are well-known to students of Navajo culture; however, the mesh of the use of the land with sacred places has not been addressed to our knowledge. Our inferences about the nature of the relationships here should be understood as only tentative speculations.

The relationship among occupancy, land use, and sacred places at the local level may be seen in several ways. First, [illegible] sacred places may define traditional land use boundaries for the kin-territorial

EVALUATION OF SIGNIFICANCE

On the basis of the data that we have examined and reported herein, we think that it is likely that there is substantial significance to be found in the relationship among sacred places, land use, and occupancy in the Big Mountain area. The reasons for this conclusion are summarized as responses to the indicators of significance developed earlier.

- Is there a symbiotic relationship among land, religion, and people that represents an important attachment to the land, and are there sacred places in use today that symbolize this relationship?

Navajo religious philosophy has as its core the belief that the universe is orderly, all-inclusive, and a unity of interrelated elements. Man's relations with these elements is governed by the principle of reciprocity. The intended or unintended disruption of this harmony results in illness. To obviate this condition and to insure well-being, prayers and chants are offered to the supernatural powers immanent in nature. These powers are interrelated and together form the whole. Animals and plants have the capacity of assuming human form and mountains are said to have anthropomorphic inner forms.

Sacred places tend to be: 1) mentioned in legends; 2) places where something supernatural has happened; 3) a site from which plants, herbs, minerals, and waters possessing healing powers may be taken; and where man communicates with the supernatural world by means of prayers and offerings.

Water sources, especially springs, comprise the majority of the sacred places in the study area. This water is used for human and livestock consumption. The relationship of water, found in sacred places, is important in subsistence land use, kin boundaries, and the relationships between peoples. It may also be important with respect to other sacred places. Our investigations suggest that particular places tend to be associated with particular kin-territorial units. Big Mountain as a sacred place tends to be the exception as its importance is recognized across kin lines. Relations through time with ancestors further reinforces the interrelations between religion and land as is discussed below. The theme of a symbiotic relationship between water, land, and social organization is well established in the literature. This inquiry suggests that sacred places and the spiritual beliefs of the people may be part of these dynamics.

Although there appear to be a number of sacred places that symbolize the relationships, we know most at this stage about Big Mountain. Big Mountain is the home of Begochidi, a very important generative force in Navajo mythology.

- Does the place play an important role in the origin myth of the people?

To many people at Big Mountain, Big Mountain is the home of Begochidi. We were not able to elicit legends and myths about Begochidi from the residents, but a review of the literature of creation and origin shows that Begochidi is mentioned frequently.

- Can shrines or places of offering be moved or relocated?

The fact that legend, a supernatural occurrance, or communication with supernatural beings is geographized in Navajo religion precludes the relocation of sacred places. The best example of this is Big Mountain.

- Has the area been used for a long time, continuously, and frequently?

Several residents pointed out that Navajos [illegible] in the area since the Emergence. Our meager data suggest that ancestors of some of the people currently were in the area in the 19th century, possibly as early as 1820. Continuity and longevity seem indicated by statements made by informants. Whether or not the sacred places have been in use for as long is difficult to say, but the fact that current residents were taught how to pray and make offerings at the sites by their grandparents suggests that a similar pattern of the use of sacred places existed in the past.

- Do people today feel as they have in the past toward the sacred areas?

All of the respondents interviewed spoke strongly of their feelings for the area. The older persons seemed especially to identify with places having sacred meaning. Some concern was expressed that the young did not understand in the same way; however, no young people were interviewed.

- Does the area symbolize unity and continuity of the people?

Land use areas and patterns of land use established through ancestors, association of particular places with particular kin-territorial units, and the fact that ancestors are buried in the area, all strongly reinforce unity.

- Do ceremonies and rituals "bind" people to the specific locations?

Reciprocity through their offerings and prayers and chants to the Holy People tends to reinforce occupancy of the area. Not only is it important to offer these prayers and chants, it is also important to receive blessings.

- Can the ceremonies and rituals be carried out elsewhere?

Not the ones that symbolize unity and continuity of the people in the area, obviously. It is possible that healing ceremonies might be held elsewhere, but the preferred place is at home.

RATIONALE FOR FURTHER ACTION

There is a need for a more detailed, comprehensive study to ascertain the religious significance of the Big Mountain area. The determination of need is based on a general will to insure the inherent right of Native Americans, specifically the Navajo in this case, to practice and prescrve their traditional beliefs.

A comprehensive study would do much to foster the trust and confidence of residents. The committment to obtaining added knowledge of the significance of the area's sacred places and the relationship of these places to the land and medical practices addresses residents' concern that these have previously not been fully recognized. As Senator Abourezk has noted:

> Based on available information, it appears that in nearly all cases the infringements which have occurred have not resulted from an expressed Federal policy, but rather from a lack of policy at the Federal level..Lack of knowledge, unawareness, insensitivity, and neglect are the keynotes of the Federal Government's interaction with traditional Indians' religions and culture (1978:4-5).

Findings from additional research should provide the basis for informed decision-making concerning the potential reapportionment of lands identified as Area A and Area B, should that need arise.

For the Big Mountain area it appears that the legal provision for access alone may result in infringement of rights, if the suggested interdependency of sacred places and occupancy is borne out.

With the possible reapportionment of available lands, a solid information base could serve to direct administrative policy towards a just decision regarding the preservation of religious freedom in the Big Mountain area.

The rationale for being attentive to religious freedom is implied in the Constitution, the Bill of Rights, State and Tribal Constitutions, the

1968 Indian Civil Rights Act, Public Law 93-531, and Public Law 95-341.

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APPENDIX 1

INDIVIDUALS INTERVIEWED OR INDIVIDUALS FROM WHOM STATEMENTS WERE RECEIVED [1]

Individual [3]	Sex	Birthdate [2]
A	Female	03/15/29
B	Female	12/25/17
C	Male	12/22/12
D	Male	02/04/25
F	Male	01/01/12
G	Female	?
H	Male	02/15/25
J	Female	01/01/08
K	Female	01/01/03
L	Female	09/15/14
M	Female	12/25/40
N	Female	11/05/22
O	Male	12/15/09

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[1] All individuals have residences or maintain improvements in the Big Mountain area, some on the Hopi side of the partition line and some on the Navajo side.

[2] Birthdates were obtained from the Flagstaff Administrative Office of the Bureau of Indian Affairs enumeration of the former Joint Use Area.

[3] Special knowledge of informants: **B is the spouse of a chanter.**
F knows herbs and helps chanters.
K is a herbalist, hand-trembler, and helps chanters.

APPENDIX 2

INTERVIEW OCCASIONS OR INFORMATION SOURCES [1]

(1) Resolution presented by the Big Mountain Committee, prepared by M. no date.

(2) Notes taken by Navajo and Hopi Relocation personnel (NHIRC) from interview with A on site, 12/4/78.

(3) Notes taken by NHIRC from interview with B on site, 12/4/78.

(4) C on site, 12/5/78.

(5) C on site, 12/5/78.

(6) D on site, no date.

(7) F on site, no date.

(8) F on site, no date.

(9) C, place and date unknown.

(10) F on site, no date.

(11) C on site, no date.

(12) F on site, no date.

(13) F on site, no date.

(14) G on site, no date.

(15) H on site, no date.

(16) H on site, no date.

(17) J on site, no date.

(18) H on site, no date.

(19) D at home, no date.

(20) Transcript of statement to NHIRC by J and family, no date.

(21) Transcript of statement to NHIRC by O and family, no date.

(22) Transcript of statement to NHIRC by H and N, no date.

(23) Notes taken by NAU research team, Joseph Shelton interpreter, in interview with D at home, 12/28,78.

(24) Notes taken by NAU research team, Joseph Shelton interpreter, in interview with K in D's home, 12/28/78.

(25) Notes taken by NAU research team, Joseph Shelton interpreter, in interview with B at home, 12/29/78.

(26) Transcript of tape of interview (25) translated by NHIRC personnel.

(27) Notes taken by NAU research team, conducted in English, in interview with L at home, 12/29/78.

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[1] Interviews by NHIRC personnel took place between 12/4/78 and 12/6/78 with Joseph Shelton and Jim Dalgai as interpreters. All translations were done by NHIRC staff. On site refers to an interview taken at the site of a sacred place. Occasions (4) through (19) are transcripts of tape of NHIRC interview.

A report to the Congress of the United States of America

Prepared on behalf of the Big Mountain Community

by

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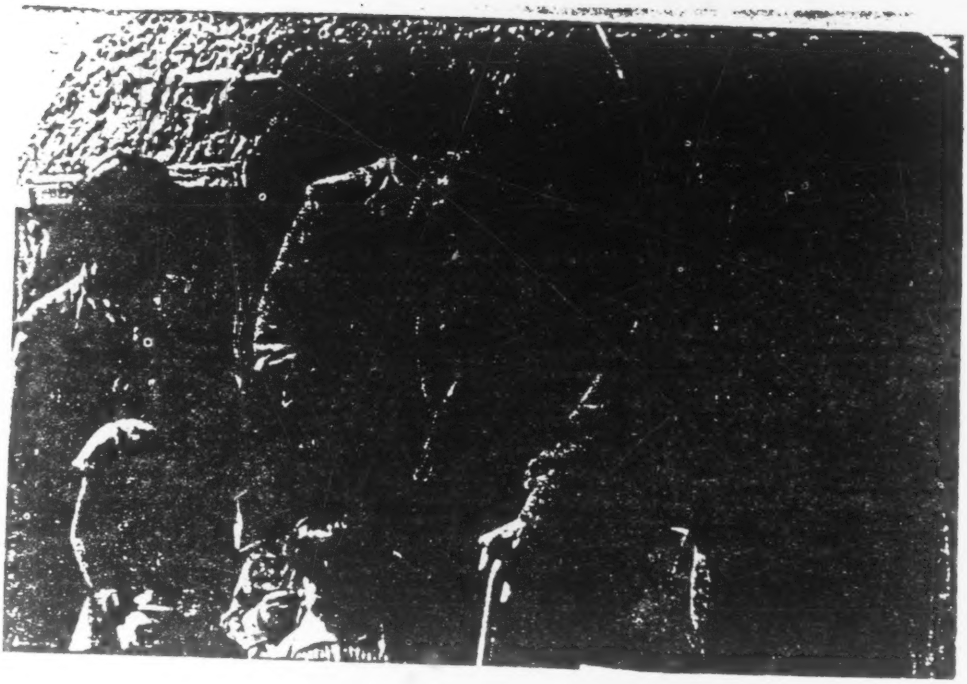
remaining photos: John J. Wood

April 5, 1981
Flagstaff, Ar[illegible]



"She said: From the time I started knowing what's going on, I know I been living around this area; around Red Lake up to here, and up to now I'm used to living on the land I grew up on and raised my kids and grandchildren. The land dispute is really bothering me; it's hurting me physically and mentally. I can't sleep, my heart is hurting. It's bothering me a lot, my son (She's calling you my son). Us old folks, the grandmas and the grandfathers, from the beginning were taught to live in hogans and to raise sheep and to pray to Mother Earth, the wind, the sun, what gives us life, the air we breath, the Mother Earth we walk on and the water we drink. We are told that each of them has gods and the fire that burns in the center of our hogans. Right now our stock has been reduced. We feel like we are being thrown in a hole. Our sheep, our life is being taken away. I think about the children, the grandchildren. What will happen to them? I have been trying to live a happy life. With a lot of stock I might not have to wait for money (from welfare). Right now they all disappeared. You look around [illegible] see only a few, and it hurts. If you can help us, thanks. [illegible] understand or speak the language of yours. I hope you help [illegible] feel helpless...

Where is the land we're moving to? We have no place to go. I am well-known among the hills; among the ditches; rivers; streams; plants. I have touched them in various ways and they have touched me the same. There is no place but here."

Asdzą́ą́ Yázhí Bedoni, Age 72
February 16, 1981
Joann Roan, interpreter

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> Our first task in approaching another people, another culture, another religion, is to take off our shoes, for the place we are approaching is holy. Else we may find ourselves treading on men's dreams. More serious still we may forget that God was there before our arrival.
>
> The Primal Vision
> by John V. Taylor

Introduction

Big Mountain is a community of Navajo people scheduled to relocate elsewhere because their ancestral lands are ceded to others through legislation and court decisions resulting from the United States Government's involvement in the "Navajo-Hopi Land Dispute". They continue to endure, in spite of almost ten years of not being able to build new homes or improve old ones, of five years of devastating livestock reduction and fencing, and many years of wondering what the future holds for their children and grandchildren. They continue to endure because their source of strength, their religion, gives them the necessary determination and resolution.

Religion at Big Mountain is the same as life, the land, and well-being. The land and the Mountain are Holy, and Big Mountain people are their caretakers. If they are forced to leave the land, they will be forced to leave their religion.

Many times Big Mountain people have tried to explain their attachment to and responsibility for their land and the Mountain, and it seems that hardly anyone listens. The Navajo and Hopi Indian Relocation Commission, the body that is charged with carrying out relocation under Public Law 93-531, listened in late 1978 and early 1979. They conducted on-site interviews and visits, and contracted with anthropologists, John J. Wood and Walter M. Vannette, to conduct further interviews and to assess the significance of sacred places at Big Mountain (Wood and Vannette 1979). The Relocation Commission's intention was to try to get the Big Mountain area set aside as a sacred area, following a favorable court decision regarding a boundary question. The court decision was unfavorable and the matter was dropped by the Commission.

Late in 1979, John J. Wood sent a letter and a copy of the assessment to the Task Force charged with reporting to Congress as required by Section 2 of the American Indian Religious Freedom Act (Public Law 9[illegible]1) explaining that relocation might be a violation of civil rights, [illegible] that the Task Force should inquire further about the question of traditional religious leaders. Nothing further was done, to our knowledge, other than a note of receipt of the letter and assessment in the Task Force's final report to Congress.

In January of 1981, Wood was asked by members of the Big Mountain Community to further investigate the relationships among land and religion through on-site visits and interviews, and to write a report to members of Congress explaining why it is essential that the Big Mountain area be set aside as a sacred area, not to be disturbed by relocating its caretakers, by mining or any other disruptive activity.

As professional anthropologists, we think that the evidence shows clearly that the Big Mountain area and its people are unique. The largest part of this report is our attempt to convey that uniqueness in words as close to the words of the Big Mountain people as we are able. Much of the information in this report is not usually given to "just anyone", particularly to non-Navajos: it represents the identity of the Big Mountain people, and it is their desire and our wish that it be treated with respect.

The People

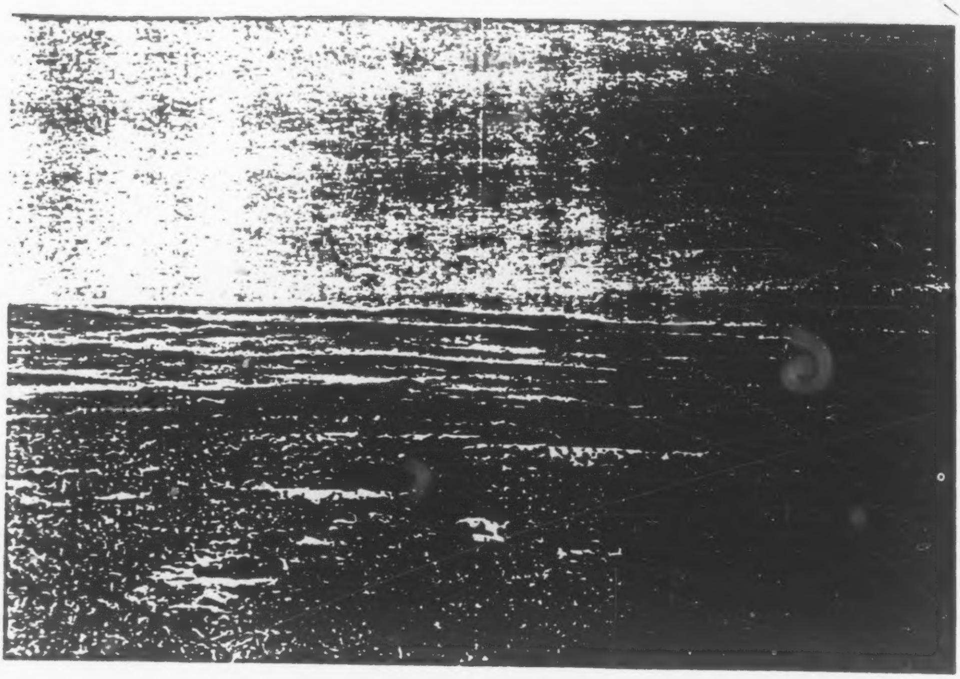
The Big Mountain community, an isolated region of about 150 square miles of northwestern Black Mesa, is located between Blue Canyon and Dinnebito Wash, focused on Big Mountain. Elevations ranges from a little over 7000 feet at Big Mountain to about 6500 feet on its east and west slopes, to nearly 5500 feet on the flats toward Blue Canyon. Vegetation is very diverse on Big Mountain, and dominated by pinon and juniper. The slopes to the east and west carry stands of pinon and juniper mixed with grasses. The transition to open grassland is virtually complete at Blue Canyon. It is very difficult to get into or out of the area in bad weather, due to poor road conditions.

No one knows for certain how long the ancestors of the present community members have lived in the area. By their own testimony, Big Mountain got its name three generations before Fort Sumner, which would place the event in the late 18th century. Three generations before Fort Sumner there was a war in the vicinity and a young warrior crawled to the top of the mountain to make an offering and to pray for his recovery. It took him two days and two nights to reach the top. When he returned to his family, in better health, he told them how long it had taken to get to the top, and they exclaimed: Dził Ntsaa! (Big Mountain!).

There is no accurate census, but we estimate that there are several hundred people related by marriage and descent who constitute the Big Mountain community today. Most of the members live on Hopi-partitioned lands. The Big Mountain "community" crystalized among those persons who oppose relocation and fencing because of what they know will happen to their way of life. But the community crystalized along relationships and interactions that existed long before the Land Dispute legislation.

Navajo social identity is defined first by membership in mother's clan (a matrilineal clan); then by father's matrilineal clan, which must be different from mother's. One's identity may also be defined, especially among older people, by maternal and paternal grandfathers' matrilineal clans. Navajo social relationships and roles are largely kinship relationships and roles, and kin terms are extended beyond the immediate fa[illegible] hence, a person's clans give direction to patterns of mutual af[illegible] interaction.

At Big Mountain, as in other rural areas of the Reservation, people live in camps or homesteads spaced from one-quarter up to one mile or so apart. Land is not privately owned. Use rights are inherited, usually at the camp level. A camp typically includes at least one traditional, octagonally-shaped, hogan, and perhaps several other rectangular frame or stone dwellings; a ramada or shade; a sheep pen; a wood pile; and an outhouse. There is no electricity, running water, or indoor plumbing. People usually heat and cook with wood or coal.



Looking East from Big Mountain

A camp may house a married couple with young children, a widowed elderly person, and extended family or many other combinations of relatives. Married couples tend to establish their own camps when they get on their feet, almost always in the traditional use area of their parents, most often the woman's mother's use area. If this process continues over time, a "land use community" evolves with a core matrilineal clan. There are five of these "land use communities", tied together by marriage, that define the Big Mountain community; so that everyone is related by marriage or descent.

Livelihood at Big Mountain since stock reduction is precarious at best. Virtually everyone had stock and depended upon them for meat, wood, cash, and credit. People also farm, since the land is rich in this region. Many people, age forty and older, are unskilled and uneducated except in these pursuits.

Some older people worked for the railroad in their youth, and they receive small social security and retirement checks. Because of the building freeze and the lack of local economic development, younger, formally educated people live and work off-reservation in border towns or reservation communities like Page, Tuba City, and Kayenta. Young people visit home frequently, often every weekend, and contribute financially and emotionally to family well-being.

The thread running throughout Navajo culture that defines well-being, indeed life itself, is "...a religious system which has for years enabled the Navajo to retain their identity in a rapidly changing world (Reichard 1974:xxxiii)."

Religion

A religion is"...a system of beliefs about the nature of the force(s) ultimately shaping man's destiny, and the practices associated therewith, shared by members of a group" (Lenski 1961:331). A religion synthesizes, through its legends, symbols, and rituals, the ethos or world view of a people; and religion as lived in a community is an important means of existential problem solving. It is not surprising, therefore, that all peoples have a religion.

All peoples have a religion, and all religions meet the same basic needs, but all religions do not start from the same assumptions. In this country we pride ourselves in our constitutional right to practice the religion of our choice. Yet our statements about and our policies concerning other religions are almost always based on the assumptions, philosophy, and logic of the Judeo-Christian tradition, exclusively. These ethnocentric statements and policies are surely due to ignorance rather than malice. At least this was the position taken by framers of Public Law 95-341, the Joint Resolution on American Indian Religious Freedom.

The Joint Resolution on American Indian Religious Freedom states:

> "That henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."

Although there is an exclusionary clause, "...including but not limited to...", the major thrust of the Joint Resolution is not religion as lived in a community. Religion as lived is more than "access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites", particularly in religions outside of the Judeo-Christian tradition.

The same narrow view is reflected in Section 21 of Public Law 93-531, the Navajo and Hopi Land Settlement Act, which reads as follows:

> "Notwithstanding anything contained in this Act to the contrary the Secretary shall make reasonable provision for the use of and right of access to identified religious shrines for the members of each tribe on the reservation of the other tribe where such use and access are for religious purposes."

Religion as lived at Big Mountain is life itself, the land and well-being. Sacred places and practices are part of the definition of occupancy there: to limit people to "use and access" without occupancy betrays a fundamental misunderstanding of the nature of religion at Big Mountain.

The Land as Home

In the Navajo way of thinking there were four prior worlds. The foundations of the present world were laid in an evolutionary succession of miraculous beings and events.

First Man and First Woman, together with other beings, emerged into a fourth world bounded by four sacred mountains: Blanca Peak in the east, in Colorado; Mt. Taylor in the south, in New Mexico; San Francisco Peak in the west, in Arizona; and the La Plata range in the north, also in Colorado. The world was still soft then. Life was hard to form and there were monsters that caused untold hardships.

One day First Man, who was living with First Woman near Huerfano Mountain in New Mexico, found a baby on top of Gobernador Knob. The baby grew into Changing Woman. She created the four original Navajo clans from her body, and taught the Navajo how to live. Her twin sons by the Sun -- Monster Slayer and Child Born of Water -- rid the earth of evils and made the land within the four sacred mountains safe and secure. These post-Emergence events are commemorated in the Blessingway legend and rite, said by some to be the core Navajo ceremony (Wyman 1970). The sacred mountains and the traditional Navajo dwelling, the hogan, figure prominently in the legend and rite, and in the thoughts of the Navajo people. As residents of Big Mountain put it: "This is how we live; This is where teaching starts".

The hogan is a home and also a place to pray; it is like a "church", and all traditional ceremonies must be held there. When a hogan is built it is blessed in a rite with songs and themes from Blessingway. Even articles and furnishings that have everyday uses, such as the corn grinding stone, a bundle of sticks used to stir corn, a wisk or brush, and the sleeping sheepskin, have a special place and an use in prayer.

At Big Mountain, it is said that the area enclosed by the sacred mountains is a hogan. The mountains are posts. Within these are a female mountain, Black Mesa, and a male mountain, the Lukachukais.

Rivers and springs are veins, and various geographic features are body parts. (Everything is male or female in nature, since that is the way life begins.) Females sit on the side of the female mountain in the hogan, and males sit on the side of the male mountain. The location of Black Mesa is also where a woman gives birth in the hogan. When a woman is in labor there, there is a sound that represents the four sacred mountains and the land. After a baby is born the afterbirth is offered to a young tree, so as the child grows, the tree grows.

Some families have a mountain soil bundle. It is patterned after First Man's "magic corn bundle":

> "...'This medicine has been placed in the hands of all of you'. It is Navajo! The mountains belong to all, and the mountain soil bundle insures its owners a comfortable partnership with the Holy People who stand within these mountains. In a family a mountain soil bundle is an heirloom which is guarded by all family members, again it is 'our medicine' and 'our mother'"(Wyman 1970:22).

Katherine Smith's medicine bundle is a deerskin bag containing four smaller bags with soil from the four sacred mountains, each tied with the jewel that is for each mountain -- white shell for the east, turquoise for the south, abalone for the west, and jet for the north. She had it made at great expense. It is: "Very holy"; "our how to believe on"; "my mind". It brings strength and wealth. It also is like a hogan.

Small pieces of the four jewels representing the sacred mountains are used as offerings to the Holy People when prayers are said. There is a basket, too, that is used in all ceremonies. The design represents the four (or six) sacred mountains enclosed by a protective rainbow surrounded by clouds. The design has an opening to the east, like the hogan, and the emergence place is in the middle.

Thus, the origin of the Navajo way, the reproductive power of nature, forms of worship and ceremony, the land, and the home are tied together in a meaningful way. It is in this system of thought that we first begin to see how religion is life itself and well-being to the Big Mountain people.

Learning About the Land

People learn by doing, participating, and observing: "We don't tell something unless it's happening". There are many teachers, usually one's closest relatives -- parents, grandparents, uncles, and aunts. Learning about the land is learning how to live.

How to [illegible] means taking care of yourself and your family by earning a livelihood and doing what is good for you and avoiding what is wrong and harmful. Livelihood to all but the youngest people is livestock, farming, weaving, cooking and housework. Children and grandchildren are told to get up early, work hard, and learn to do things for themselves: "...I tell them they (are) going to have to do it on their own, nobody is going to do it for them...and be up early at dawn...".

How to live means praying to and giving thanks for what gives us life: mother earth, the wind, the sun, fire, air, and water. Each has gods or Holy People. There are prayers, songs, and offerings at special places --like springs, shrines, flat areas, young trees, and

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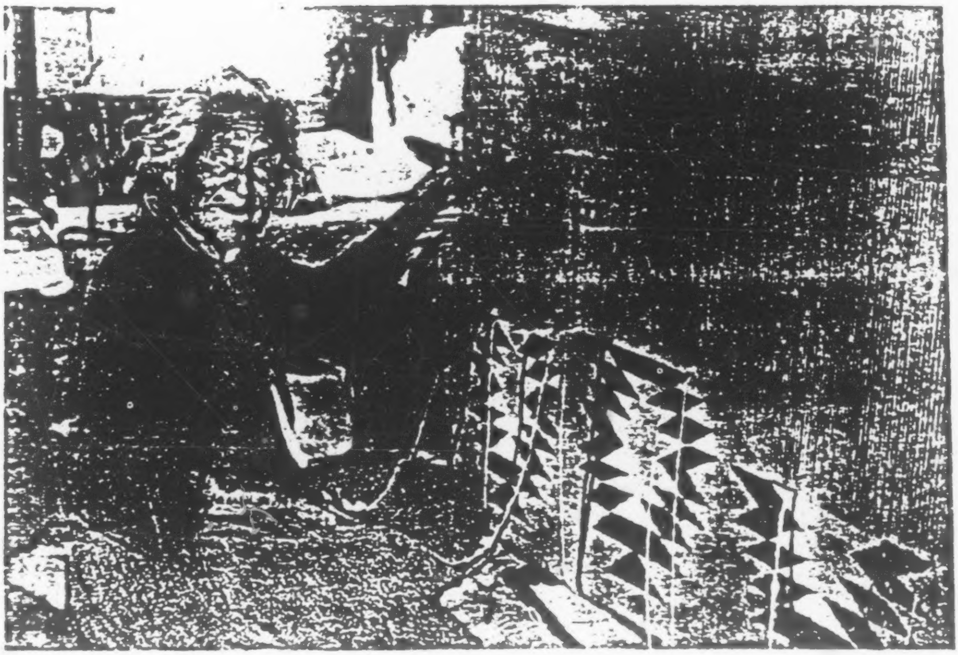
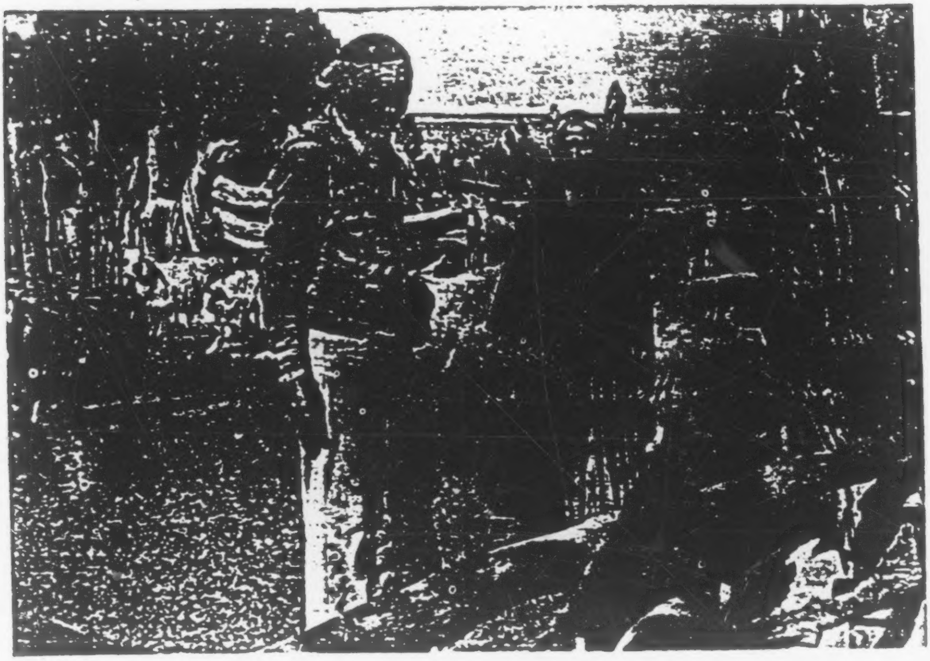


Lydia Watchman



"When I was a boy my parents, my grandparents, my aunts, my uncles would tell me of life. Life is where the sheeps are. It will be up to me to tend them, and through that I could get what I need and what I want. Then they told of a home, so I built a hogan. Then more stocks like cattle and horses. Then I needed transportation to carry things around, so I bought a wagon; Then I got a cornfield. By then I needed help so my folks suggested I get a wife and have children. That is part of life. All this made me think of the land, water, and grazing for livestock. I needed all that to survive. Then besides that there are offerings needed along the way. There are songs and prayers needed to help me along, so they taught me some songs and I learned prayers. I learned of sacred places where I go to and make my offerings and give my thanks. Up to this day it has helped me this far. I sti[illegible]m living that life. The land, the grasses, waters, what the [illegible] needs, and through that I get what I need by selling them. We'r[illegible]ed to this land we're living at. I am. My folks have told me that the land is where all my memories are, and where my children, my grandchildren will carry on. And we know the land, we know the sacred places, we know where all the waters are, and the land knows us. And so will my children. We will know it and the land knows us."

Diné Yázhí, Age 59
February 16, 1981
Joann Roan, interpreter

at home -- for well-being and protection and blessings received that must be learned. Children come to understand more deeply through ceremonies that are given for them. Some become medicine men or women and help their people in that way, others' lives are simply enriched and given meaning.

There is a strong obligation to pass the lessons of how to live on to your children and grandchildren, because of your responsiblity as a parent and a grandparent, and out of respect for your parents and grandparents.

Now, children and grandchildren are at school, usually far away from home. Before stock reduction, parents and grandparents sold lambs and wool to buy school clothes and supplies for the children. "Every year we do the same thing for them so they keep on thinking they have something for themselves and they own something. That is the way it was, but now there's hardly anything. We have only one horse left". Children and grandchildren return on weekends and during holidays. When they are home, they participate in the traditional way of life and worship.

> "I still talk to my grandchildren.. It's different now that they have to go to school. I looked at them now and they are still living a good life and they are happy, maybe because they are still here with me. I still tell them. This is my granddaughter (the one that is staying with her). I am getting old. She will have to continue carrying on the tradition of what I taught her and make our place a strong place to live here".

Sacred Places

The concept of a place that is hallowed or holy from its associations may be expressed several ways in the Navajo language. For example: dahodísin (they consider it holy); hodiyingo haz'ą́ (a place that is holy); hodiyingo baa ntsáhakees (a place considered to be holy); and ayeel al'į́į́gi (where offering is made habitually)(Irvy W. Goossen, personal communication) . All the land within the four sacred mountains is hallowed land, of course. And, "Around here (Big Mountain) we always remember our mountains --the four different directions". However, the relationship between land and religion at Big Mountain also has a local and regional dimension that is part of the uniqueness of the area.

Sacred place is commonly expressed as a place of offering in the Big Mountain community. A place is sacred because it is possible to communicate there with the Holy People through prayer and offering. The Holy People cannot be seen, but their presence is known through air movemen[illegible] and vibrations, a certain kind of light, pictographs, noises, s[illegible] kinds of ruins, and through legends. Winds, níłch'i (which als[illegible]y be translated as air or spirit), carry the prayers and offerings to the Holy People; thus, winds provide access to power and assistance.

There are several consistent qualitative associations, such as kinds of places, atmospheric conditions, or times, that provide needed access to the Holy People. For example: the early morning hours are thought by some people to be a time when the Holy People are around to be petitioned. Mountains, watercourses, springs, hills, flat areas, at young trees, at lightning-struck trees, and at home are common places where offerings and prayers are made. There are also several "shrines". Some of these places are used by local families on a regular basis, and some of the same places are used regionally. We were told that the families living close to a sacred place have first priority.

If you know the appropriate prayers and offerings, you may make them yourself. Otherwise, a medicine man may make them for you or with you. Offerings are usually jewels such as chips of white shell, turquoise, abalone, and obsidian, and pollen or corn meal. The kind of offering, prayer, and ritual depends upon the purpose. If a person has bad dreams or there are bad omens, they may be interpreted by a hand trembler who will direct the person to use a certain sacred place with a medicine man. Also blessings are asked for and thanks given at sacred places. Blessings are asked for long journeys, soldiers going into the armed services, livestock, rain, grass and crops, and health well-being and protection. Families have songs, prayers, offering, and legends that are passed down from generation to generation. When they are passed on the obligation to keep them up is passed along too. "If we don't do that; if we don't carry on these rituals for protection, I know for myself that I am usually sick. P.H.S. hospital does not know what is wrong with me. If I go and offer my prayers, then my mind is clear and I feel better after that, and I go on raising my family".

There are some places, usually those used regionally, that are "most respected". Two of these that we have knowledge of are Big Mountain itself and Red Willow Spring, a few miles from Big Mountain to the northwest.

Big Mountain is said to be in the shape of a person or head. "That's the way it is, so we pray to it. Inside, it has breath (air). It breathes, so we pray to it. Its name is Be'goochídí Hastiin. He is the one that created man. The air in the mountain knows each and every one of us. He knows all that we carry, all that we do and all that we have. That is why we have to sacrifice some of what we have to it; like cows, horses, sheep. That's the way the stories have always been told".

On Big Mountain there are two shrines; one is for livestock and one is for gambling and magic. You have to go with one or the other. The grandfathers of the people at Big Mountain stayed with livestock.

In the beginning of the universe, the Holy People set one hill aside for livestock. There used to be a sea then that covered the area except for high ridges and mountaintops. At that time, the Wind People put the shrine at Big Mountain and said: "that's where you will make your sacrifice"; "there are going to be people here". After the sea was drained out the Colorado River, squirrels and birds planted trees [illegible]re and elsewhere. The shrine still exists today -- we visited it. [illegible] is a circle of rock slabs placed horizontally with a doorway to [illegible] east and a "fireplace" in the middle where offerings are placed.

The shrine is the place of Be'goochídí who has four colors just like the four sacred mountains. Be'goochídí is a wind -- a man and a woman -- that came down there. And, Talking God is the caretaker for the Holy People that dwell at Big Mountain.

Be'goochídí is an extremely important Holy Person, mentioned frequently in the literature of Navajo religion (see Wood and Vannette 1979), most often in a creative role. And, the identification of Big

Mountain as "...like the Wind of the Holy People" is highly significant. According to McNeley, "...the Navajo concept of níłch'i, "wind", is the primary intellectual instrument by means of which life, behavior and other events in the Navajo universe are explained and integrated into a consistent system of thought (1975:iii)". The winds, the Be'goochídí's in this case, carry the prayers and offerings on. The winds there know everything that goes on, as cited previously, and they presumably can carry that on too.

As far as anyone knows, the first use of the wind shrine goes back at least four or five generations. "After coming back from Fort Sumner, these elders go over there to offer prayer for their own family. From all areas they would come and then they would go back and ask blessing for their family, whatever few families they had, and whatever sheep the government gave them.... Those prayers were answered." The first people to go up there were special people, like "chief priests", who had to observe special behaviors so they could communicate with the Holy People. "The other tribe (Hopi), they don't have a prayer over there like the way we understand the prayers that we had that is passed down to us. We asked them, but they said they can't go over there".

Several people from the Big Mountain community know the ceremonies that are held there, and many people we talked to had had a ceremony given for them at the shrine: two people briefly described the ceremony they had there. People from Pinon, Black Mesa, and Forest Lake also use the shrine on a timely basis, every two or four years. One can pray, too, in arroyos where soil from the mountain washes down since the "...same prayer goes up to the mountain".

Red Willow Spring is another place of great significance in the Big Mountain area (although for reasons to be discussed later on, some of its significance is lost). There was, in addition to the pool of water: a place with light from a hole in the rock where vibrations of air blew out; another place for offering communication between the earth and subsurface because air came through the rock; a "little house" in the cliff with a path to it ("Grandfather knew Holy People dwelled there because of the path"); and pictographs and hand prints. There is still a pictograph of a yé'ii (Holy Person) on the wall of the spring, where a long time ago a yeibicheii ceremony was given and the yé'ii went into the rock. There are several major ceremonies that pertain to the area. During the yeibicheii, medicine men from the region came to get water at the spring and to perform a healing ritual before ending the sacred dance. Blessingway and a rain ceremony were held here, and special offerings were made to help people regain their hearing and eyesight.

Burial Grou[illegible]

Most families' roots in the Big Mountain area go back at least four generations. The parents, grandparents, and greatgrandparents who taught their children and grandchildren how to live and passed on the responsibility for the care of the land, "...are put back into the earth."

There are family burial grounds in the family grazing areas. "It's part of the sacredness we have here". In one family: "We have a memorial day in the Anglo way. We go over there and see them with flowers".

"The rain, it represents the people that are already gone beyond. When it is raining, then they are here".

Plants and Other Important Resources

In discussions with Big Mountain residents about the importance of the area, the most common topic of conversation concerns the tremendous variety of useful plants or herbs that grow on the mountain, from bottom to top. "It (Big Mountain) it well-known from all areas because of the herbs that are collected there by the people." Some plants, such as the one used to make ceremonial baskets, are said to grow better at Big Mountain.

We do not know how many different plants are known and used at Big Mountain, but they must number in the hundreds, and many plants have multiple uses. For convenience, plant uses may be grouped into three rough categories: practical, pharmaceutical, and ceremonial. Practical uses include use as food, tools, and fuel. Pharmaceutical uses center on collecting and processing plants for accidental injuries, sores, post-childbirth healing, colds, stomach upsets, and the like. Some medicines of this sort are collected for animals. Plant medicines are gathered at Big Mountain for ceremonial healing for most major Navajo ceremonies. The following were specifically mentioned: Arrowway, Antway, Holyway, Featherway, Nightway, Beadway, Eagleway, and Blessingway. The ingredients for "bitter medicine" are gathered there for use against witchcraft.

When plants are collected for medicine (pharmaceutical and ceremonial), they must be collected in a special way . You call the name of the plant, offer it corn pollen, and tell it why you came; for example, "a person is sick". You tell the plant about the person you want to get well, and pray to it. You do not pick the plant you pray to; you have to pick another one. The prayer is the same for all plants; only the plant name, purpose, and person differ. The prayer itself invokes the power of plants and recites their origin legend.

Anyone who knows the uses, legends, and prayers for plants may use them. There are many people in the community with this knowledge. The plant medicines are not kept in medicine kits or "carried around", with a few exceptions. When a person is sick and the cause is known, the plant or plants are collected then, for that specific person and purpose.

There are other important resources in the Big Mountain area. Deer are used for food, and their skins, when prepared in a special way, are used in ceremonies. There are eagle nesting sites near Big Mountain. Eagle feathers are used in ceremonies, and for certain kinds of h[illegible]ing, the claws, bones, and meat of the eagle are necessary . [illegible]d powdered from sandstone struck by lightning at Big Mountain is [illegible]ed against witchcraft and put in the shoes for protection. [illegible] the traditional Navajo way of life, Big Mountain is an especially favorable place.

Effects of the Land Dispute

Specific cultural products and processes may be "...seen as coping mechanisms developed over time by a group of people living together...", according to Dorothea C. Leighton, a physician and social scientist with much cross-cultural experience, including work with the Navajo (1978:33). All people strive to meet several kinds of needs: physical, psychological, and sociocultural. Physical and psychological needs are clear enough, but sociocultural needs require further elaboration:

> "Three such needs have been identified as fundamental: (1) orientation of the person regarding his position in the group and the positions of others; (2) a secure membership in a definite human group; and (3) recognition of and subscription to a set of values which will serve as guidelines and will inform the individual if he is doing the 'right' thing (Leighton 1978:34).

In other words, sociocultural needs are needs for a social and cultural identity. Big Mountain people still have a strong sense of identity as traditional Navajos, which is one of the unique characteristics of the area. That identity, as we have seen, is expressed in the interrelationships among land and religion or life. Above all, Big Mountain people are concerned about what relocation will do to their way of life. Ashiiké Bitsi put it this way:

> "I have a lot of grandchildren.... I just don't know how they are going to live if we ever move away from here. This is our identity. My grandfather and my father says not to lose your identity. Maybe some other areas where relocation is taking place, maybe people do not have this kind of teaching, that they are willing to go and start a new life over again somewhere else. Here we cannot make ourselves do that. Many times we say these things to people who come to see us. Many times we say the same things to people that question us. It seems like really, anybody's really not caring what we have, what life here really means to us and what our generation holds...."

Customary ways of meeting human needs, and ways of dealing with situations when they are not met, develop in a particular society over time, Leighton says further. Slow changes are almost imperceptible and inevitable. Rapid changes can severely tax a culture's coping mechanisms, especially when there is external blockage of or interference in meeting individual needs. Leighton says that four responses to external blockage are common: 1) overcompensation; 2) substitution; 3) withdrawal; and 4)

> "..the persons may continue to strive, but may develop many different kinds of psychiatric or physical symptoms which indicate his various frustrations. He may become depressed, anxious, overactive, angry, bored, irresponsible; he may engage in acts against society such as theft, murder, destruction of property; or he may develop symptoms of physical disease.. such as asthma, peptic ulcer, high blood pressure, migraine headaches and many others (1978:35)."

The principal effect of the Land Dispute and associated legal and legislative actions thus far has been rapid external blockage of individual need satisfaction -- physical, psychological, and sociocultural -- through drastic livestock reduction, a building freeze in effect since 1972, and fencing. The level of frustration is well-documented, starting as early as 1977 (Wood, Vannette, and Andrews 1979; Topper 1980). There is some evidence that some of the traditional coping mechanisms already have been overtaxed (Topper 1980).

People at Big Mountain are striving to meet their needs, but they are very frustrated: tears were not unusual in interviews we took; the emotion expressed when prayers were offered for the Big Mountain community at the Native American Church meeting attended was truly heart-rending; open conflict within a family occured at a community meeting, an almost unheard of occurence; and there have been many deaths, recently, attributed to the effects of the land dispute. Still they are struggling to hold things together and to cope with livestock reduction, the building freeze, and fencing as best they can. In all this, their tradition of how to live --the land and its religion -- continues to give them strength, determination, and resolution.

People are now looking ahead with anxiety to what will happen in the next few months after the Hopi take over jurisdiction and begin enforcing their ordinances regulating livestock trespass and home improvements, and to what will happen with Life Estates and with involuntary relocation. They realize that these actions will destroy their source of strength, their tradition. Louise Begay Yázhí describes it well:

> "Comparing all these on my traditional side and what the relocation wants me to do, there is a big inner conflicting that's in me. But as soon as I consider myself not moving, that I'm staying, then I feel better and I am not that sick. When people want me to move, if I feel that way, then I start getting headaches and everything else besides that to take my health away.

And Tsosie Horseherder Yázhí told us: "If our life is uprooted, how do we use our philosophy for the future?...I shed tears each day when I think what's going to happen".

There are several traditional means of coping that have been or will be affected by the Land Dispute settlement provisions and by relocation. We touched upon them in earlier sections of this report.

First there is the effect on the social support system, the family and clans. The building freeze and the lack of local economic development have accentuated the trend for young and better educated people to move out of the area. Younger family members return on weekends and help out, but the continuity between generations is being broken. This break will be complete if people have to relocate, because the older generation will not be able to teach their children and grandchildren how to live on the land of their ancestors, nor will they, themselves know how to live on new lands. There are other, related problems. For instance, one woman is upset because her son-in-law [illegible] to share her home, contrary to Navajo custom, because of the building freeze.

People are tied to the land as soon as their umbilical cords are offered to young trees after birth. They have a caretaking responsibility for the land, out of respect for and responsiblity to their forefathers and the Holy People. Sacred places are part of that responsibility:

> "We are not leaving the area. The places were handed down from my mother and father. They told me to use it. They told me how to live on that land. If we don't pray there, if that prayer is not offered and we relocate and are no longer there, the Holy People might think humans are no longer in existence and that may bring the future evolution to another time. I don't want this evolution to occur that soon. I want my children to live and my grandchildren to live"

In an earlier study at Big Mountain, Wood and Vannette (1979:23-24) stated that:

> "The relationship among occupancy, land use, and sacred places at the local level may be seen in several ways. First, ritual at sacred places may define traditional land use boundaries for the kin-territorial units we have postulated for the Big Mountain area. The boundaries appear to have meaning for use-rights as well as for 'protection'; protection in terms of Reichard's idea of a protective line established by ritual beyond which the unknown and potentially dangerous may lie. Seen in this way, one's ancestors could be thought of as having 'secured' the land through the proper prayers and offerings. To leave the land might be potentially dangerous, and it might be a violation of the stewardship and reciprocity with the Holy People".

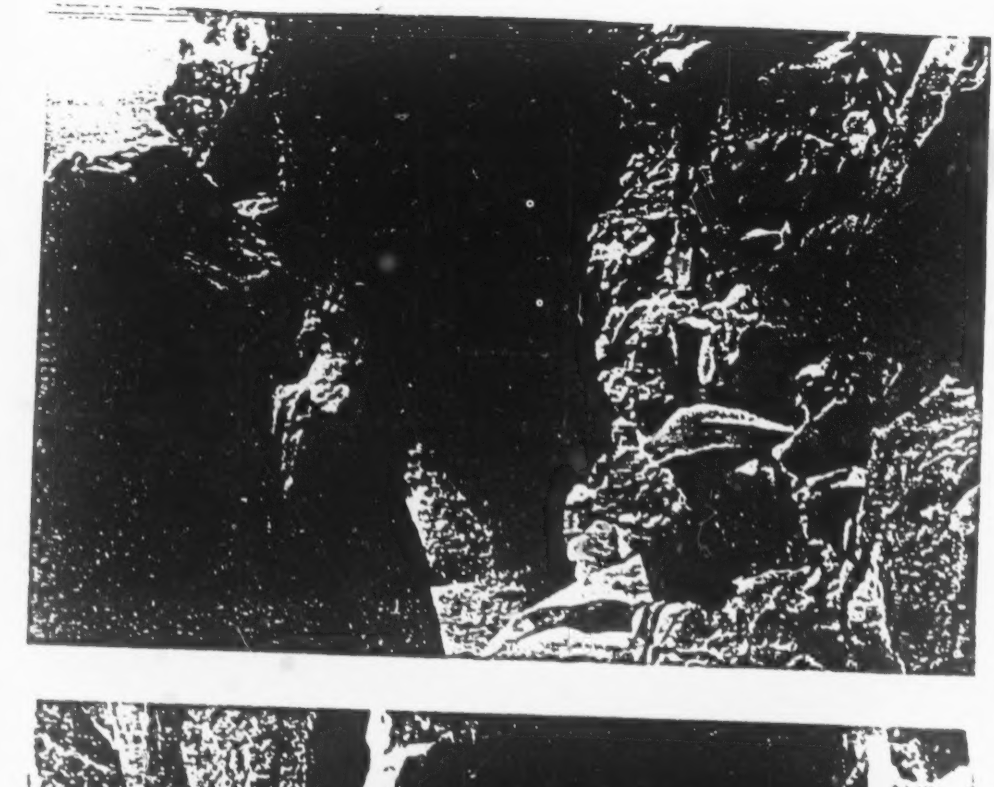
We found further support for this interpretation, illustrated, for example, in the previous and following quotations from Big Mountain residents:

> "If we move -- suppose we make up our mind that we are going to relocate. We are not familiar with many places, we are not familiar with many areas. Because we have never been there, there might be a place where people are not supposed to go that is for something else, and we might be living there. Or maybe we might go to a spring where our people were forbidden. And here we thought it was a good place and we go there and we conflict with the Holy People that protect those areas. This we could not know because our grandfathers and our mothers and fathers did not tell us, because we never knew that things like this relocation would ever take place. With those things in mind, and with those rituals that we do every spring and when there is no rain, then we do not consider ourselves leaving the area and going to the unknown."

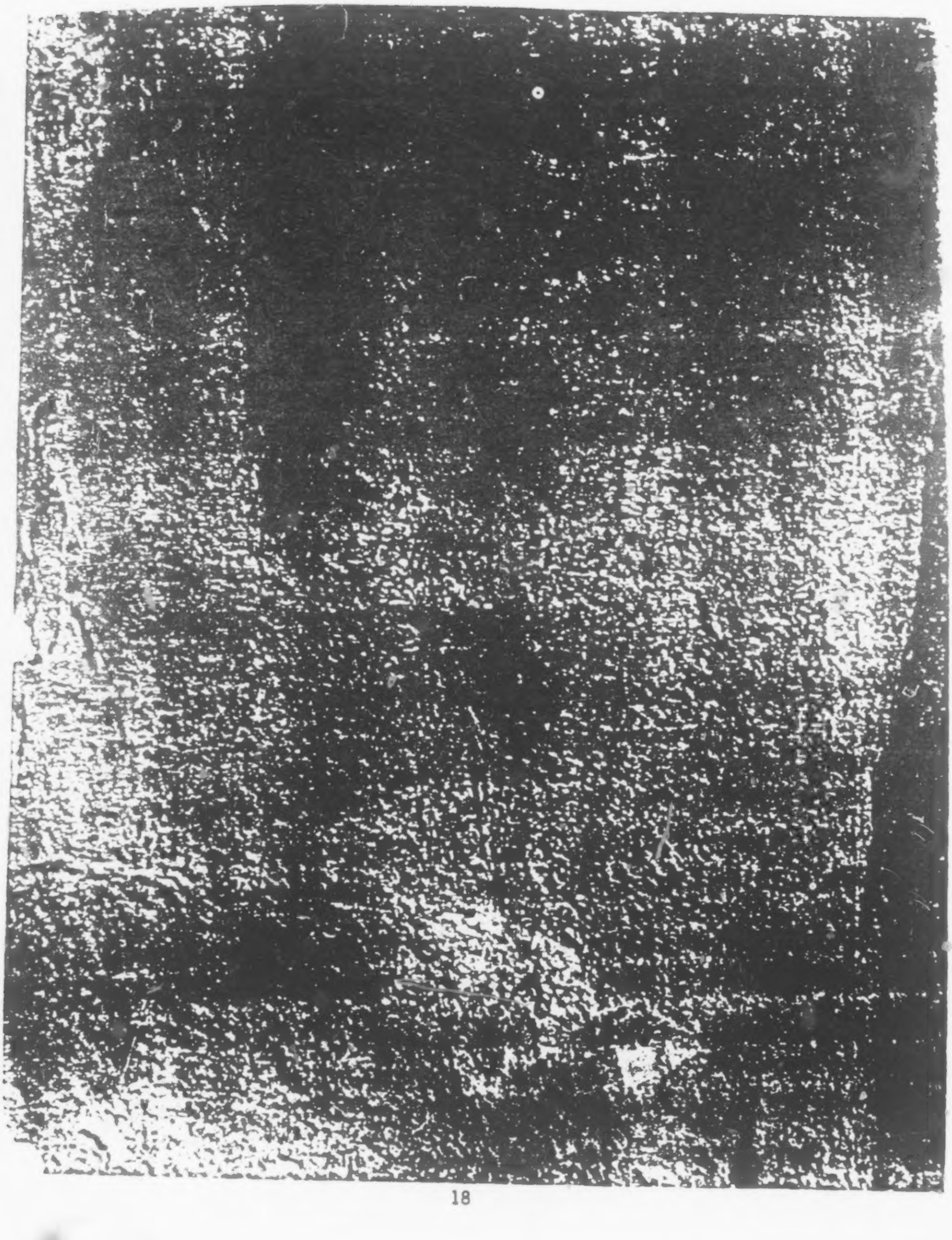
At another, highly significant, level, the power and protection of the "Wind of [illegible] Holy People", Big Mountain would be lost to the Big Mountain people if they were no longer resident there.

Red Willow Spring is already virtually destroyed as a sacred place by actions set in motion by Land Dispute legislation. Recently, several bulldozers dragging chains for land clearing operations set in motion forces that caused the collapse of most of the wall of the cave at Red Willow Spring. People can no longer use it in the traditional way.

People are concerned about what will happen to their use of plants if relocation takes place. Such a variety of plants will be difficult



Red Willow Spring b and after [illegible]



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to find elsewhere. More importantly, they need to be close to the plants, for emergencies and since they have to collect them for a special patient and a special purpose.

"What will be done with our burial grounds?", people say. "Our roots are buried into the earth. When we move no one wants to move our roots -- no one wants to do it".

Life Estates were proposed and enacted with the intention of easing the effects of relocation on the elderly. Big Mountain residents were given preference in the enactment. But people at Big Mountain are concerned that they will be fenced off from their sacred places and their plant collecting areas with Life Estates, and since the Hopi do not believe in the same way, they say, they are worried that they will be denied access or have to pay. They are also worried because their children and grandchildren will only be able to spend a set amount of time with them, and they need their children's and grandchildren's support and affection to survive.

It would be impossible, obviously, to reproduce the Big Mountain area its people anywhere, or for it to be the same when cut up into Life Estates under Hopi jurisdiction.

Legal and Legislative Issues

Although the Navajo and Hopi land dispute seems to have been finally laid to rest, at least on paper, for over thousands of Navajos and several Hopi families the problem of relocating has just begun. For the Navajos residing in the Big Mountain area, the reality of relocation has come as a shock. Since the passage of PL 93-531, they have consistently refused to leave their sacred mountain, springs, and plants, and to move to some other area on or off the Reservation. No amount of government funding can induce them to give up what their greatgrandfathers and, more importantly, the Holy People have entrusted to them.

Several of the Navajos interviewed stated that their grandfathers and grandmothers had been living in this area before the days of the Long Walk to Fort Sumner in 1863, or shortly thereafter, and therefore before the Executive Order of 1882 which was issued by President Chester A. Arthur giving this area of disputed land to "the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon" (Executive Order of December 16, 1882). Parts of Big Mountain have been occupied for over one hundred years, and for over one hundred years, these people have neither had government approval nor disapproval, nor the benefits that other Indians have been entitled.

The fact that the Navajos' and Hopis' way of life could be threatened by living in the 1882 Reservation was not apparent until the landmark court decision of Healing v. Jones heard by the District Court in Prescott, Arizona in 1960. Both the Navajo and Hopi Tribes, through an Act of Congress in 1958, were permitted to go to court to seek ownership rights over the disputed land. During the court proceedings, both the Navajo and Hopi tribes alleged that they were entitled to exclusive use of the 1882 Reservation. The 1958 Congressional Act had given the Court the responsibility of deciding title. The opinion of the Court held that District 6 was to be classified as exclusively Hopi and "As to the remainder of the reservation, the Hopi and Navajo Indian Tribes have joint, undivided, and equal interests as to the surface and sub-surface including all resources appertaining thereto, subject to the trust title of the United States" (U. S. District Court 1962:102). In essence, the Court threw the responsibility of deciding exclusive rights back to Congress.

This area was henceforth referred to as the Joint Use Area, which encompassed close to 1,822,082 acres and is occupied by more than 6,000 Navajos and several Hopi families (Scudder 1979:iv). In 1972 the Ninth Circuit Court ruled that the Navajo in the JUA reduce their livestock holdings, according to Bureau of Indian Affairs officials, by 90 percent (Kammer 1980:84). A freeze was also placed on any new construction in the area.

The effects of these rulings on the people of Big Mountain, and the Navajos in general, have been detrimental. With the freeze on construction, no new homes were allowed to be built for the growing number of young adults who wanted to remain on the land that they consider as their birthright. The drastic reduction of livestock also cut into people's income.

The final blow to the people of Big Mountain, and to other Navajos residing in the Joint Use Area, was the passage of Public Law 93-531 by Congress in 1974 which returned to the District Court the responsibility and the authority to partition the remainder of the 1882 Reservation. On February 10, 1977, the Joint Use Area became obsolete. As a result of this division, the people of Big Mountain were contacted and told that their land, which the Holy People and their grandmothers and grandfathers had passed on to them , now belonged to the Hopi Tribe and Hopi livestock. Navajo livestock reduction continued along with the freeze on new construction for the Navajos living on the Hopi side of the partition. In 1980, Public Law 96-305 was passed through Congress which allowed the Navajo Tribe to purchase up to 150,000 acres of land to settle the relocatees. To this date, no land has been made available, so people are being directed by the Relocation Commission to settle in urban areas near the Reservation; into an environment in which they are totally unfamiliar as residents.

Assuredly Congress must have foreseen the mechanical problems involved when it passed PL 93-531. It delineated the responsibility of the drawing of the partition line to the Courts and appropriated monies for a Relocation Commission whose responsiblity was to handle the actual relocation process. What Congress did not anticipate was that by forcing the people of Big Mountain to leave their land, they were also forcing them to leave behind their religion.

In 1978, several residents from Big Mountain traveled to Washington to participate in the "Longest March" concerning Indian rights. They invited Senator Goldwater to visit them and discuss with them the hardships of relocation. Senator Goldwater did visit them later that same month and pledged that he would help them. Several people that we interviewed mentioned Senator Goldwater's appearance, but they were unsure of what, if any, changes in relocation policies had taken place as a result of his visit.

One major change that has occured since the passage of PL 93-531 is the Life Estates amendment (a provision of PL 96-305). This amendment would, in essense, allow a proscribed number of older, disabled Navajos to remain in the Former Joint Use Area until they die. In the Navajo language, Life Estates has to be translated as Death Estates, which is actually a more accurate description.

The concept of Life Estates seems to be an inadequate answer to relocation. It is also incompatable with Navajo social organization. An earlier study of the impacts of relocation on residents of the Former Joint Use Area found, with regard to Life Estates:

> "The major problem here is the extent to which life estates will sever the generations and isolate older Navajos from the kinship networks and children on which they have become increasingly dependent as they age (Scudder 1979:123).

The report goes on to state that the best solution would be to repeal PL 93-531 "(coupled with a major land acquisition and development program for the Hopi)" (Scudder 1979:123). We strongly agree that this solution would be suitable to all concerned.

The passage of Pl 93-531 has placed unending hardships on the Navajos of Big Mountain, both physically and psychologically. If the blame for such events is to be placed on any shoulders then it must be placed on our government's one hundred years of inactivity, misconceptions, and varied interests in the area. The recent responsiblity of relocation which was placed on the Courts by Congressional Act acknowleged too late that something should have been done earlier.

Governmental action has also infringed upon peoples' free exercise of religion as it is stated in the First Amendment. Big Mountain is considered sacred among the Navajo who live in and around this area: there are sacred shrines on it, origin myths about it, and frequent visits made to it. It is a focal point and a reminder to the Navajos of the Holy People who set this area aside for them. The importance of Big Mountain to the residents of this area is comparable to the importance that is placed by both the Hopi and Navajo on the San Francisco Peaks located north of Flagstaff, Arizona. Both Mountains are considered sacred and carry within them a powerful healing potential. As Feeny pointed out in his research on the San Francisco Peaks:

> "the San Francisco Peaks is just such a holy and living deity to the Navajo people which by virtue of its sacred animation serves as a powerful, life-sustaining force directly influencing, guiding and harmonizing the intellectual, emotional and spiritual beings of the Navajo peoples (Feeney 1979:11).

This same notion can be applied to Big Mountain and its relationships with people in that area. Without Big Mountain and its encompassing shrine, springs and other places of offering and prayer, and plants, the Navajo people would be unable to heal themselves when ill, or celebrate when things go well. These beliefs and practices are part of a Bona Fide Navajo religious faith and tradition and cannot be separated or taken away from the people according to the Free Exercise of Religion Clause of the First Amendment.

On December 15, 1977, Senator Abourezk introduced Senate Resolution 102 which eventually became Public Law 95-341, or the American Indian Religous Freedom Act. It states, in part:

> "That henceforth it shall be the policy of the United States to protect and preserve for American Indians, their inherent right of

> freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."

The law also states that:

> "The President shall direct the various Federal Departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices..."

As a result, a Task Force Report was submitted in August 1979. In Appendix C there is reference to a letter written by John J. Wood and a paper by Wood and W. M. Vannette entitled "A Preliminary Assessment of the Significance of Navajo Sacred Places in the Vicinity of Big Mountain, Arizona". This seems to be the only reference to relocation and its indirect prohibition of the right to religious freedom. As stated previously, land and religion are synonymous to the Navajo People. To move people from their land is also moving them away from their everyday religious beliefs and practices. Public Law 95-341 acknowledges our government's lack of understanding when it states:

> "Whereas such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws..."

Or as Representative Morris Udall consented in his statement on the American Indian Religious Freedom act:

> "The traditional religions of the Native American people are not our religions and we are unaware of practices, rites, and ceremonials of these religions. We have, in the past, enacted legislation where we have unknowingly brought about the infringement of the religious rights of the Indians... It is the intent of this bill to insure that the basic right of the Indian People to exercise their traditional religious practices is not infringed without a clear decision on the part of the Congress or the administrators that such religious practices must yield to some higher consideration (Udall 1978:H6842).

What higher considerations could possibly prohibit a peoples' right to worship their deities? Is relocating Navajos, particularly in the Big Mountain Area where we have gathered statements of long-time occupancy and religious use of the land, for the purposes of cattle grazing and mining a higher consideration?

Public Law 95-341 admits that the government is dealing unknowingly with the lives of Native Americans. The legislative history which brought about PL 93-531 also suggests that Congress lacked the knowledge of how to approach this land dispute and therefore wasted years in and out of Court deciding what to do. Is there any substantial evidence that moving thousands of Navajos away from their homes is not also an act of misunderstanding?

Several authorities including lawyers, anthropologists, social service and mental health providers, and members of the Relocation Commission who have dealt with the relocatees on a regular basis affirm that relocation is detrimental; yet Congress and the Courts proceed to expedite partition and relocation at the same time saying that the Native Americans' inherent rights of "freedom to believe, express, and exercise the traditional religions" will be protected and preserved by the United States.

Summary and Recommendations

Big Mountain people are unique in the strength of their religion, which is their land, life, and well-being. For traditional people such as these, forced relocation will be cataclysmic: it will take away their only means of coping, their reason for being, by blocking the expression of their religious beliefs and practices. The Big Mountain area cannot be reproduced. Its qualitative associations of light, sound, wind, legend, history, plants, place, and people are just not the same anywhere else.

Relocation, or any other disturbance of the land and its people, would be a violation of Big Mountain peoples' constitutional rights under the Free Exercise of Religion Clause of the First Amendment, and a blatant disregard of the intent of the American Indian Religious Freedom Act. Consequently, we respectively recommend to the Congress of the United States of America that the Big Mountain area be set aside as a sacred area in perpetuity, not to be disturbed by relocating its residents or their descendents, or by mining or such other activities which the residents may determine to be detrimental to the land and their well-being.

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Appendix I: Method

Most of the reported data were gathered during six weekends spent as guests of the Big Mountain community, between January 18 and March 15, 1981. Some interviews and observations taken by Wood and Vannette (1979) in December 1978 and January 1979 are used as supplements.

On January 17, 1981, we explained our purpose and plan in a community meeting. The following weekends were spent interviewing in homes, at sacred places, and in the community hogan. Our involvement in the community was fairly high. Our base of operations was the Big Mountain community hogan. We shared many of our meals with residents, visited socially, and J. Wood participated in a meeting of the Native American Church.

Because of the nature of the subject we were researching and because of time constraints, we chose to proceed with a minimum of structure. A list of questions was prepared as an interview guide (Appendix II). Interviews were taken mostly in Navajo, with the help of interpreters from the community (Annie L. Homes, Joann Roan, and Sally Tsosie), and taped. We attempted to talk to as many different knowledgeable persons from as many different families as we could. In all, twenty five persons were interviewed or contributed information (Appendix III), and everyone was cooperative and helpful. We believe that the data represent the thoughts, knowledge, and feelings of the community.

Wood, Stemmler, and Wood donated their time and expenses to the project, except for transportation, which was provided by the Department of Anthropology, Northern Arizona University.

Appendix II: Interview guide

Big Mountain Project
Initial questions
John J. Wood
1/23/81

A. How does a boy or girl learn his or her feeling about the land?

B. Teach me about this land and what it means to you like you teach your children or grandchildren.

C. Teach me the meaning of sacred places or shrines. What kinds are there? What are their names?

D. Questions about specific shrines:

1. What is place called? Are their other names?
2. How did it get its name(s)?
3. What do people do there?
4. Are there stories about this place? Do you know them, and would you tell them to me?
5. Are prayers or offerings made there? Do you know them, and would you tell them to me? Who makes offerings and prayers there, and for what purposes?
6. Is this place the place of any holy people? If so which ones?
7. Have you or has anyone you know had a ceremony over you there? If so, when and what one?
8. Are plants, herbs, minerals, waters or other things collected there? For what purposes? Is there a certain time of year and certain way that they are collected? Can these things be collected other places for these uses. Why or why not?
9. When is the place used? Who uses it? Is this person a singer, hand shaker, or what? What ceremonies do they know? Are people from Big Mountain or somewhere else?
10. When was this place last used, and who used it?
11. Do people who use this place also use other places for the same purposes outside of this area?
12. Does everyone, young and old, respect this place?
13. Are there others who have knowledge of this place? What are their names?

Appendix III: Persons from whom information was received

Daniel Ashiiké
Violet Ashiiké
Larry Beck
Victor Beck
Asdzą́ą́ Yázhí Bedoni
Chísí Nez Begay
Effie Begay
Joe Benally
Jane Biakeddy
Ruby Biakeddy
Slim Biakeddy
Ashiiké Bitsi
Annie L. Homes
Rose Manygoats
Bessie Pahi
Joann Roan
Katherine Smith
Sally Tsosie
Lydia Watchman
Diné Yázhí
Louise Begay Yázhí
Tsosie Horseherder Yázhí
Jimmy Zee
Rebecca Zee

"NAVAJO SACRED PLACES"

Teesto Chapter

Researched By: Peggy Francis-Scott

ACKNOWLEDGMENT

We are forever indebted to our elders who are still carrying on the sacred traditional ceremonies. Many are Medicine people who were the informants for this research.

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SACRED PLACES

*4 BIG HILL BUTTE - Nitsaadahnask'id :

Big Hill Butte is located on the Western side of the Hopi Partition land side the fence. It is a very sacred butte where Medicinemen make sacred stone (nitliz) offerings, Corn Pollen (Tadidiin) offering and prayer sticks (k'eet'aan) during ceremonies and when deemed necessary by the people. These offerings are done at dawn. The people go up the mountain when it is still dark and await the sun to come up. When the first sun rays hit the mountain top, they pray and sing and make offerings for good blessings and for protection. It is a female mountain. It has medicinal herbs on the mountain. In the history of the Navajo people, it is told that when White Shell Woman was traveling to the west, she stopped in many places to rest. Here atop this Big Hill Butte she rested accordingly there is a pile of rocks that signifies here action. Here she waited for her husband, the sun, to greet her. It is also because of this stop and rest that is now sacred to the Dine' People.

*6 - CAVE MOUNTAIN - Al'aahoghani (Ant'iihbahoghan) :

Cave Mountain is a house for the sacred rain and air beings. The Dine' people were instructed by the sacred rain people and air people that whenever the earth became dry and drought was evident, they are to make sacrificial offerings there to ask for rain. In case, there was continuous wind. Prayers and offerings are made on this mountain to ease the awful wind.

During the rainy season, in this part of the land the first rain in form of mist begins here. This is where the rain people set their foot on earth first.

This mountain has a large hole on the east side of it. Here the Holy people lived in two separate rooms. The left room was a place for the male beings. There are bows and arrows drawn in this room. The right room was for the female beings. The room have grinding stones and stirring sticks to represent the female. The mountain's original name was Al'aahoohghani, Two House Mountain. It is both female and male mountain. It is a very sacred mountain to the Navajo. There are medicinal herbs and golden eagles living on this mountain.

*8 - WHITE CLAY LAKE - Toligaaí :

The White Clay Lake is located on the within the Hopi Partition fence. During the migration of the White Crane (deli) they make their stop here to rest. The medicinemen who perform the Life Way ceremony (Iinaaji) made offerings to the cranes at this place during the migration. The people also make offerings there for rain. Lifer Way Medicine or herb grow here.

*9 - FINGER POINT BUTTES - Tsezhinditloí :

There are two buttes at Finger Point. It is on the northwestern part of the Hopi Partition fence. The larger butte is a male butte and the smaller butte is a female. It has many herbs near it that are used for ceremonies. Some Medicinemen say that Finger Point butte is a large serpent.

Some say it is a sacred stone bundle butte. It is very holy, and people are prohibited from climbing it. Some Navajo ceremonies have their beginnings here.

*16 - YELLOW TOP BUTTE - Dzilbitaadzitsoii :

This butte is on the Northern side of the Hopi Partition fence. It is a female butte. A Holy Person called Maiden that Becomes a Bear (Ch'ikeeh Shash nadleehe) used it as her home. ON top of the butte there are imprints of the bears hand and foot. The Medicinemen who perform the Mountain Top Way and Prostitution way make offerings there. People are absolutely prohibited from climbing it.

*17 - STAR MOUNTAIN - Sosilah :

This mountain is sitting on the north side and within the Hopi Partition fence. At the very tip of the mountain there is a hole. This is where the Wind Holy people live. The people make sacrificial offerings there. It is also a place where the people offer deer skulls when captured or killed. There are many Holy Beings that live atop the mountain. The Gambler (Nihwiilbiihi) wont he beautiful maidens from the top of this mountain. It is a male mountain. The little Star Mountain (west of the Big Star Mountain) is female mountain. Both of these mountains have herbs on them.

*18 - NIPPLE BUTTE - Dzil'abe'ii :

Nipple Butte is on the western side and within the Hopi partition fence. It is the home of Lightening Holy People. Medicinemen who perform the Lightening way ceremony make offerings there for healing. It is also a home for Air/Wind.

The Windway ceremony offerings are made here. It is a male mountain. The other butte, north of Nipple Butte called Gloffstein Butte (Seibidaagai) is a female butte.

Talahogan -

Even though Talahogan is no longer occupied by the Navajo people because it is in District 6 (Exclusive Hopi Reservation) it is still sacred and used by the Dine' people to make prayers and offerings there. The people still gather herbs there for religious ceremonies.

INFORMANTS NOTES :

All of these buttes, mountains and lakes are very sacred to the Navajo People. They are included in prayers and songs. They all have stories that are told from one generation to another. They all have herbs (medicine) for ceremonial uses that were put on them by the Holy people. They also have counter parts to them, such as male and female. The lives Navajo people evolve around these sacred places. Life would not be held sacred and holy if such places did not exist.

It is also very important to mention that all the scared places that have been identified are within the Hopi Partition Fence.

***1 - RACE BETWEEN THE HAWK AND ANTELOPE :**

Long ago before the coming of Whiteman or the Spanish, the Navajo and Hopi were in dispute over land in he Teesto area. This dispute was over grazing, water, animals, sacred places among the people form Polocca and the Navajo people from Star Mountain. It was decided that the two tribes will have a race to see who would have the right for use of land.

The Navajo people decided to get the Nat'oh Dine'e (Tobacco) TAchii'nii to get an animal to race for them. The Navajo Tobacco clan decided on an antelope to race for them. The Hopi decided on a hawk to represent them for the race.

The race began from Talahogan. Both tribal members had medicinemen who knew the sacred names of the animals. They knew various sacred songs and prayers to say to win the race. The animals began the race running to the south to what is now Seba Dilkai School. They ran past this butte on towards and around, near the JUA boundary line onto Chezhinhalgiizhii, Two sided Mountain. The Navajo had a smoking ceremony for rain to come. The hawk was very swift and would get far ahead of the antelope, but when it started to rain, the hawk flew into a small hold on the side of the mountain of Seba Dalkai and the antelope continued running. When the hawk knew he was ahead, he would stop and rest on tree tops. The antelope kept running all the way without stopping. They ran around the two sided Mountain and headed back to Talahogan, where the people were anxiously waiting. The rain continued all the way home, this made it almost impossible for the hawk to keep flying.

While the hawk stop to get out of the rain, the antelope quickly took the lead and came in first. The race ended at Talahogan. The Navajo Tobacco people were very happy because they won not only the race, but the land as well. The Hopi people were saddened as they lost the land rights and killed their hawk. It was agreed on this day that there would be no more dispute between the two tribes for land since this was a fair race. Talahogan is a sacred place to the Navajo People, especially the Tobacco Tachii'nii clan and it is mentioned in the Blessing Way prayers.

Later on other Navajos and Hopi began to squabble about the land again, so lines were drawn by both tribes. These lines were made according to land marks such as, washes, trees, boulders, buttes and mesas. There were six people that drew this line, four Hopi men named: Dabolo, Keshizhahi, Dloo'and Gahch'idi or Naki Adiitsa'i, two Navajo men were BiighaanDili and Hashoo'ah.

Then some year later, there were Navajo Chiefs who wanted a school and a medial center to be built, so they planned on having an elementary school and a hospital built in Keams Canyon. These men were Hastii Alts'oozi, Hastii Neez, Bitanii sani, Beeshbiitohi. The Hopi people resisted any kind of development. After this, other Navajo men assisted in District Six line such as Jack Nez and Dine' Tsxaaz, one Mexican man and other men whose names are forgotten.

Told by: Clah Tsosie
Dlaa Ts'osi

Naada'ast'aan - SACRED CORN BUNDLE :

The Navajo people lived in Taalahoghan below the Awotove Ruins. They had been living for a long time when drought came. There was no rain for 4 years and the plants and crops did not grow anymore. The people were hungry because of the dry season. Then one night one of the people saw a light flickering out in the distant toward the west. The people discussed this light that they saw so one man decided to look for it. He walked a long ways to try to find it but could not. He tried three times unsuccessfully. The forth time he set a forked stick and set a land mark to follow the next day. He set out towards the landmark to find the fire or the flickering light. He traveled for somedays till he found the place where the light was seen. He found himself at the foot of San Francisco Peak. There at the entrance of a home, a big tobacco plant grew. A voice came from inside the home and said, "Come in my grandchild. What are your doing here? There are no earth-surface people around here." The an entered the home and found a man sitting there smoking. He whisker was very long and yellow. He was Tobacco Man - Nat'oh Hastii. The man pulled out his tobacco pouch and found out he had the same design as the Tobacco man's pouch. The Tobacco man said, "Our Tobacco pouch design is the same, we must be of the same clan, therefore we are related." The man told Tobacco man he came for a purpose. That there was drought on his land and there were no crops and the people were hungry. Tobacco man indicated he had the power to make rain.

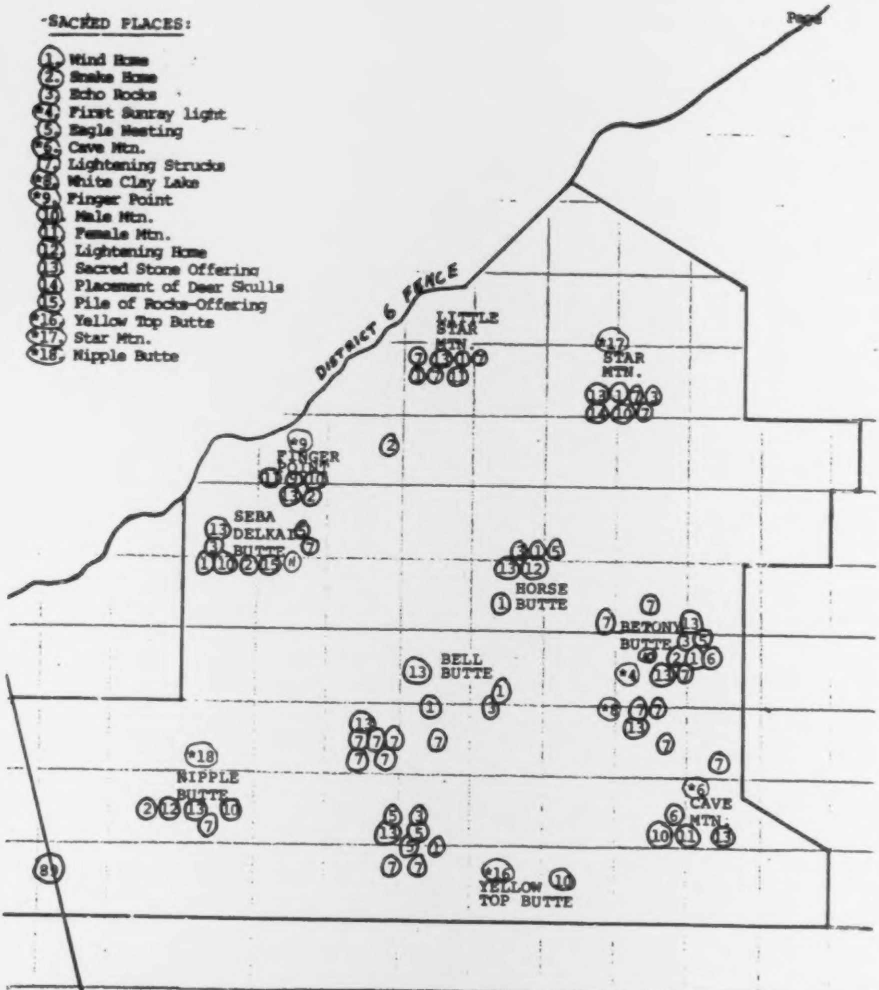
They smoked mountain tobacco together and told each other sacred stories with songs and prayers. Tobacco man was a Holy Being and made a naada'ast'aan for him to take back with him to his people. This sacred object is similar to mountain sacred bundle, but it is for moisture (rain), and crops. It is made with white, yellow, blue, and different colored corn and corn pollen. It is a very sacred object. It was given to Tobacco Tachii'nii clan by the Holy Being, Tobacco man, to use for asking for rain. Tobacco also represents rain, that is why it was given to this clan.

The man began his return trip. As soon as he started back to his home land female rain (niltsa bi'aadii) began to sprinkle. All the way home he traveled with moisture with him. After he returned it rained for four days and four nights. The Tobacco clan people were very happy because they were blessed with an object that represented rain. They became the Care takers of this sacred paraphernalia.

This object-Naada'astaan has been in the family for many generations. Then many enemies came and began raiding, killing and kidnapping the Navajo people. The people sought some safe place to keep the sacred object. It was decided to take it to some relatives in Polocca. There was a Hopi man who lived in the farthest village of Walpi in Polocca who was a Tobacco clan that agreed to be the caretaker of the object. He was a religious leader of the village. This first Hopi Caretaker was called Dahbolo. After he died of old age it given to another Hopi Tobacco clansman named Keshizhahi, then it was passed on to another Hopi, Hahoo'ah, then to azee'.

After Azee' died, the Navajo Tobacco clan people still have possession of it. Some of the older Navajo men and women of Tobacco clan use to go to Walpi to smoke in the Kiva with the Hopi Tobacco clan for rain during the summer months and during the Kachinam Dance (ye'iindikaah). People like Adika'i, Azhiin, Mae Thomas and so on.

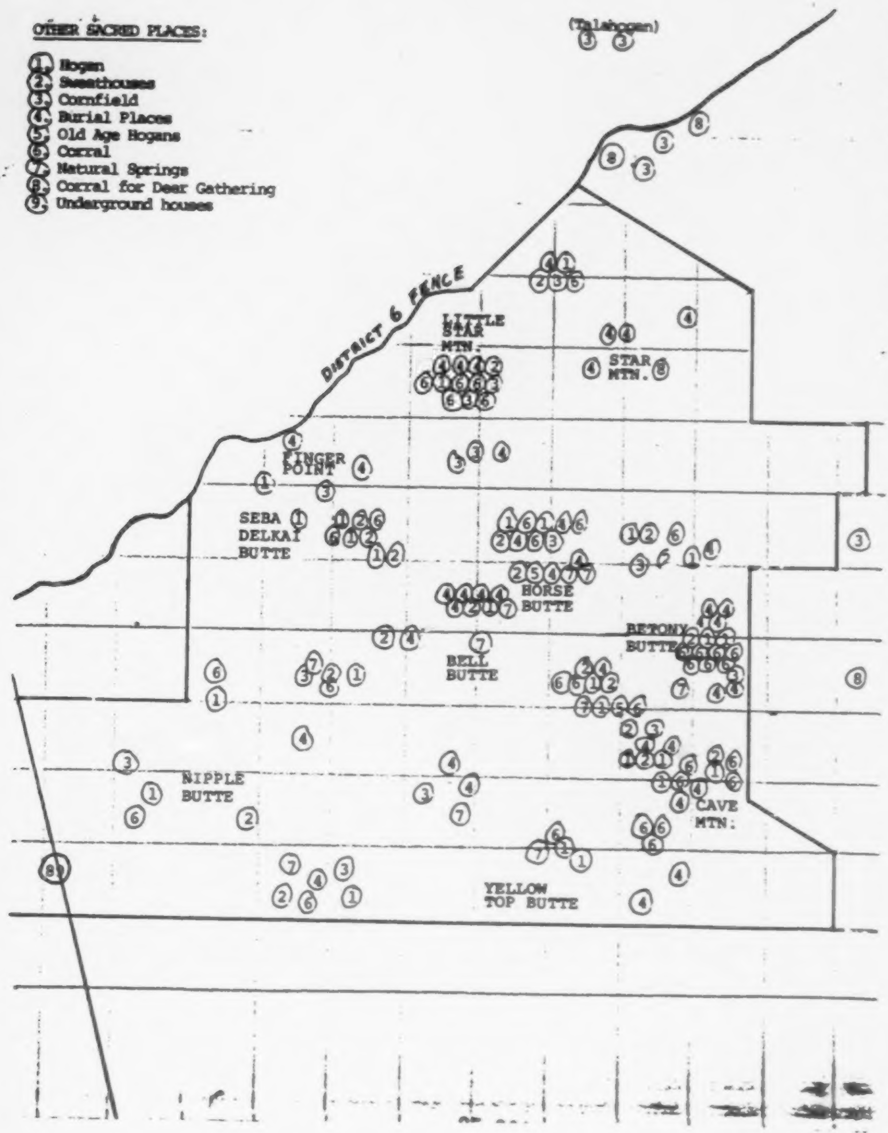
Later during the Spaniard conquer era, a Navajo Man Bighaan Dili who was of Tobaahi clan married to a Tobacco clan woman-Asdzaa Bidee'i took his family to Polocca-Walpi for refuge. This is how Navajo Tobacco clan became Hopi people today.

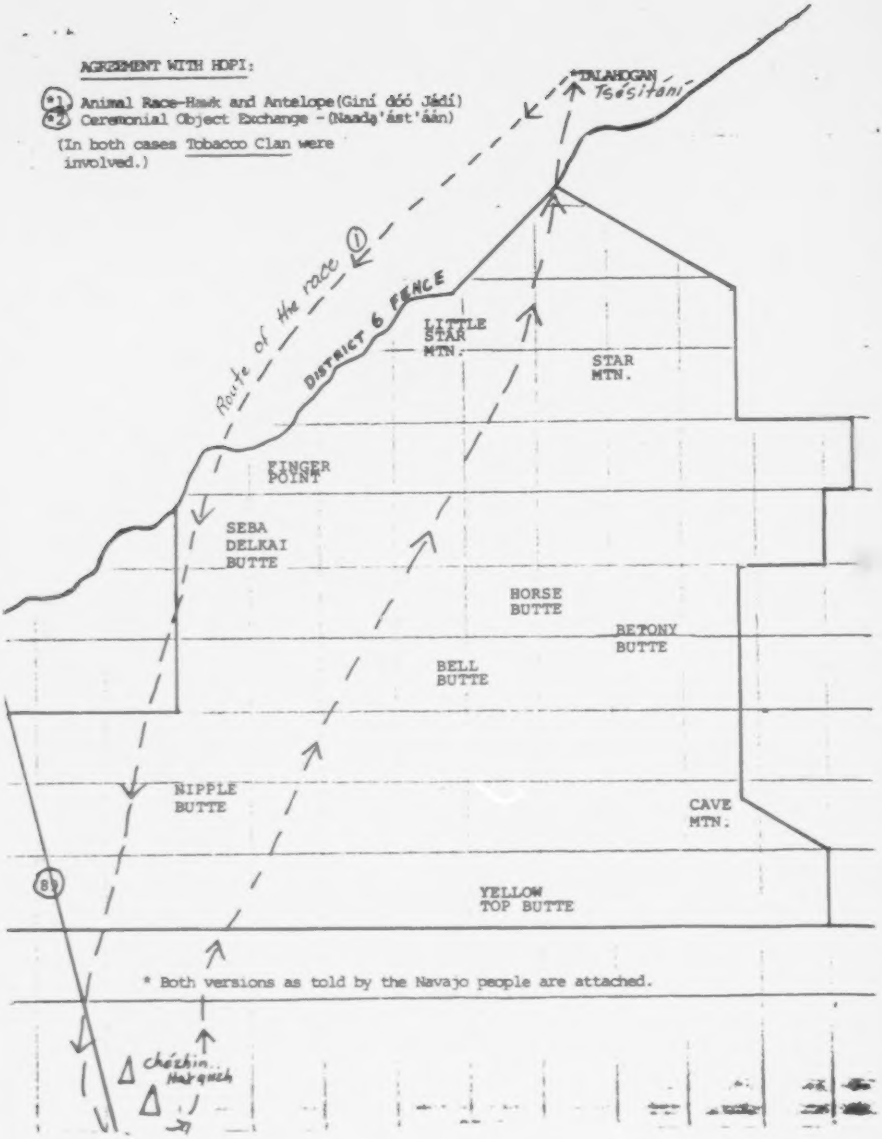

SACRED PLACES:
1. Wind Home
2. Snake Home
3. Echo Rocks
*4. First Sunray light
5. Eagle Nesting
*6. Cave Mtn.
7. Lightening Strucks
*8. White Clay Lake
*9. Finger Point
10. Male Mtn.
11. Female Mtn.
12. Lightening Home
13. Sacred Stone Offering
14. Placement of Deer Skulls
15. Pile of Rocks-Offering
*16. Yellow Top Butte
*17. Star Mtn.
*18. Nipple Butte
Page
DISTRICT 6 FENCE
LITTLE STAR MTN.
*17 STAR MTN.
*9 FINGER POINT
SEBA DELKAI BUTTE
HORSE BUTTE
BETONY BUTTE
BELL BUTTE
*18 NIPPLE BUTTE
*6 CAVE MTN.
*16 YELLOW TOP BUTTE
*4
*8

* Individual Stories on these Buttes and Mountains are attached.

*4-Big Hill Butte
*6-Cave Mtn.
*8-White Clay Lake
*9 Finger Point

*16-Yellow Top Butte
*17-Star Mtn.
*18-Nipple Butte


OTHER SACRED PLACES:
① Hogan
② Sweathouses
③ Cornfield
④ Burial Places
⑤ Old Age Hogans
⑥ Corral
⑦ Natural Springs
⑧ Corral for Deer Gathering
⑨ Underground houses
(Talahogan)
DISTRICT 6 FENCE
LITTLE STAR MTN.
STAR MTN.
FINGER POINT
SEBA DELKAI BUTTE
HORSE BUTTE
BETONY BUTTE
BELL BUTTE
NIPPLE BUTTE
CAVE MTN.
YELLOW TOP BUTTE



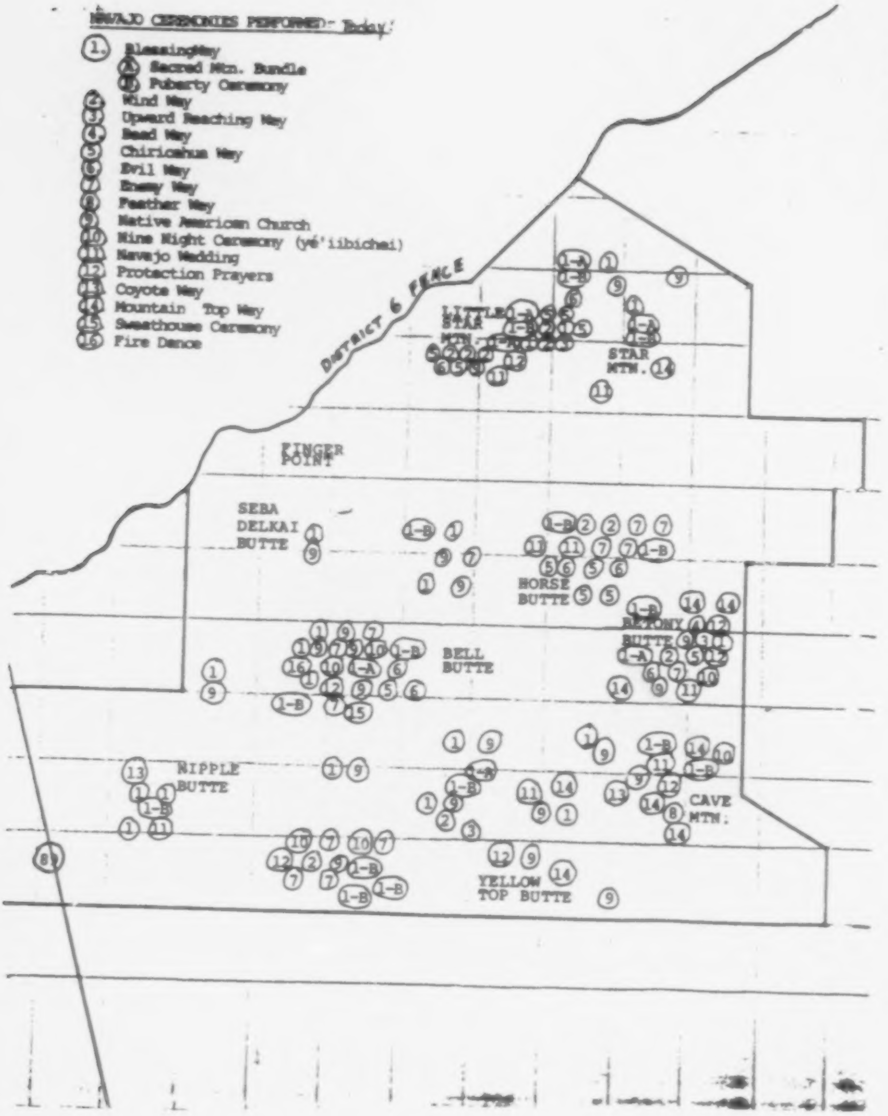
AGREEMENT WITH HOPI:

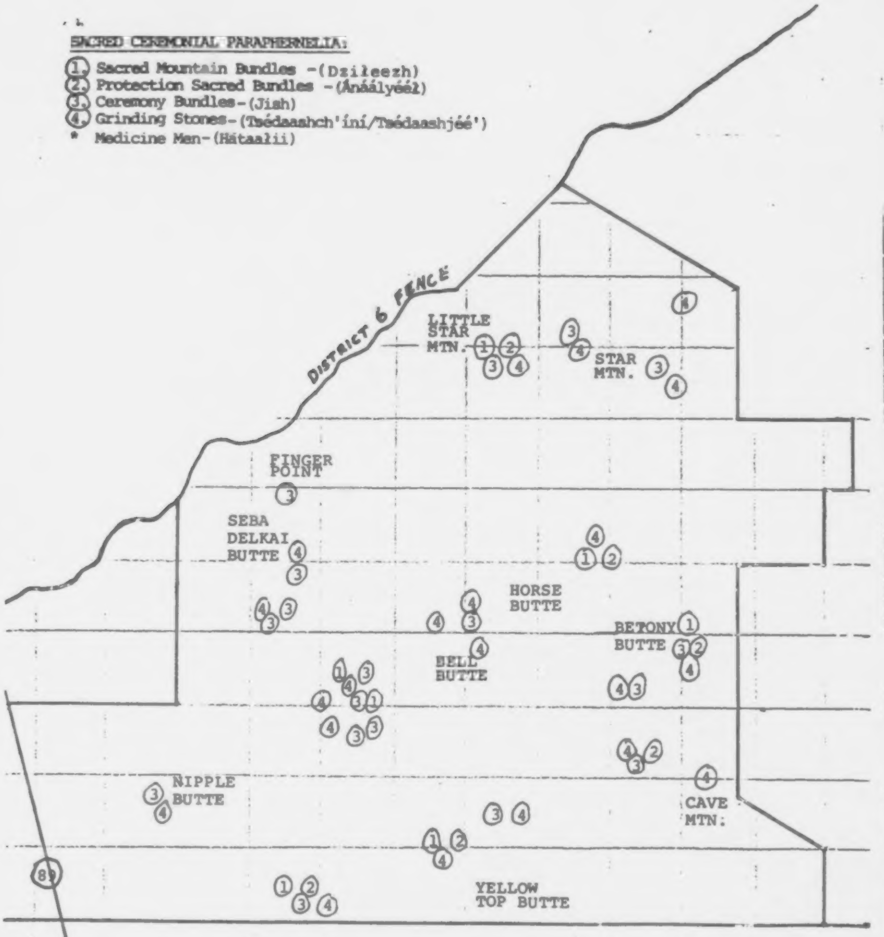
(*1) Animal Race-Hawk and Antelope(Giní dóó Jádí)
(*2) Ceremonial Object Exchange - (Naadą'ást'áán)

(In both cases Tobacco Clan were involved.)

* Both versions as told by the Navajo people are attached.

*TALAHOGAN
Tsésitáni
Route of the race ①
DISTRICT 6 FENCE
LITTLE STAR MTN.
STAR MTN.
FINGER POINT
SEBA DELKAI BUTTE
HORSE BUTTE
BETONY BUTTE
BELL BUTTE
NIPPLE BUTTE
CAVE MTN.
87
YELLOW TOP BUTTE
chézhin..
Hat-quch


NAVAJO CEREMONIES PERFORMED- Today:
① BlessingWay
Ⓐ Sacred Mtn. Bundle
Ⓑ Puberty Ceremony
② Wind Way
③ Upward Reaching Way
④ Bead Way
⑤ Chiricahua Way
⑥ Evil Way
⑦ Enemy Way
⑧ Feather Way
⑨ Native American Church
⑩ Nine Night Ceremony (yé'iibichei)
⑪ Navajo Wedding
⑫ Protection Prayers
⑬ Coyote Way
⑭ Mountain Top Way
⑮ Sweathouse Ceremony
⑯ Fire Dance
DISTRICT 6 FENCE
LITTLE STAR MTN.
STAR MTN.
FINGER POINT
SEBA DELKAI BUTTE
HORSE BUTTE
BETONY BUTTE
BELL BUTTE
NIPPLE BUTTE
CAVE MTN.
YELLOW TOP BUTTE

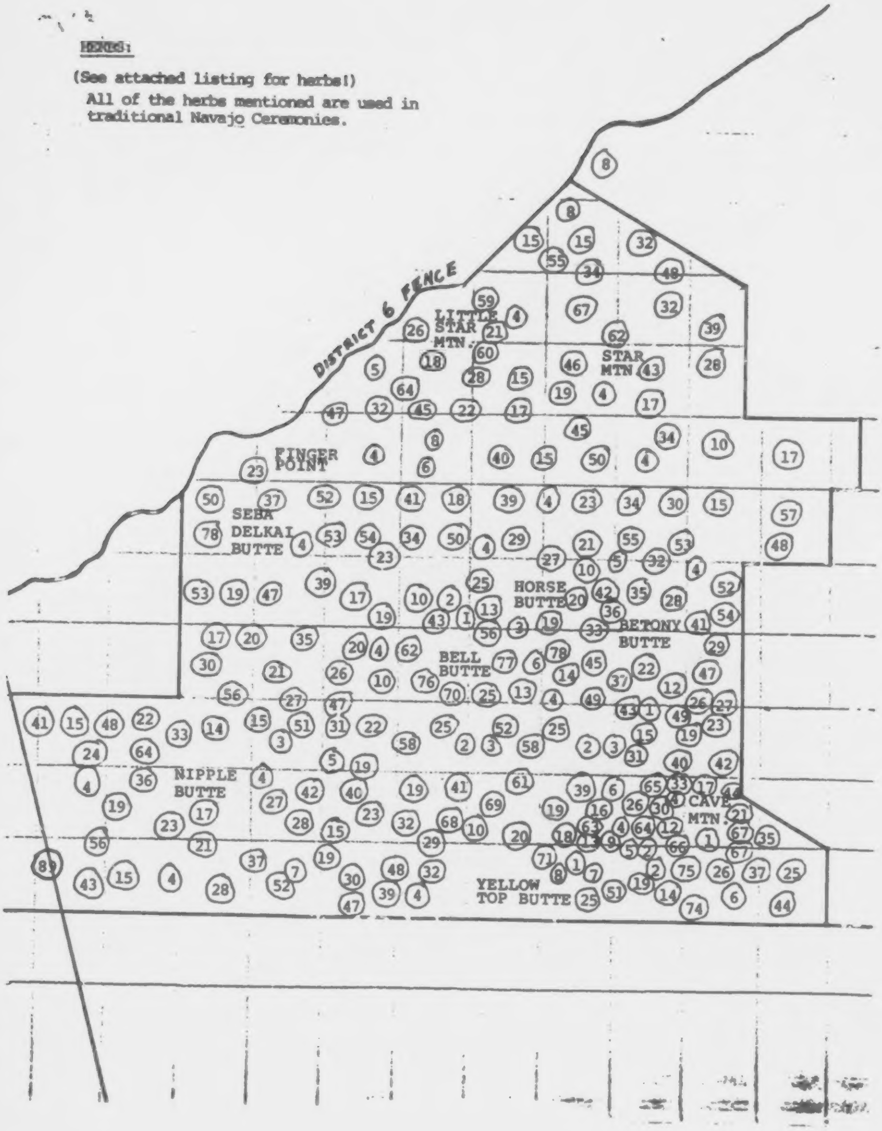

SACRED CEREMONIAL PARAPHERNELIA:
①. Sacred Mountain Bundles -(Dziłeezh)
②. Protection Sacred Bundles -(Ánáályééł)
③. Ceremony Bundles-(Jish)
④. Grinding Stones-(Tsédaashch'íní/Tsédaashjéé')
* Medicine Men-(Hátaałii)
DISTRICT 6 FENCE
LITTLE STAR MTN.
STAR MTN.
FINGER POINT
SEBA DELKAI BUTTE
HORSE BUTTE
BETONY BUTTE
BELL BUTTE
NIPPLE BUTTE
CAVE MTN.
YELLOW TOP BUTTE
89

* Names of Medicine Men are listed on attached sheet.

These Medicine Men listed are permanent residents of Teesto Community.

HERBS:

(See attached listing for herbs!)
All of the herbs mentioned are used in traditional Navajo Ceremonies.


DISTRICT 6 FENCE
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STAR MTN
FINGER POINT
SEBA DELKAI BUTTE
HORSE BUTTE
BETONY BUTTE
BELL BUTTE
NIPPLE BUTTE
CAVE MTN.
YELLOW TOP BUTTE

I	BIRTH	HERBS
①	Plant that has odor of buffalo urine (?)	-ayani azhlizh haníísaní
②	Roots-like buffalo hair plant	-ayaníílghaa'í
③	Globe mallow-False mallow	-azee nitłini
④	broom weed-Snake weed (which bares seeds)	-chil dilyesí binaa' nahadłeehí
⑤	gummy plant	-chił dijee'i
⑥	Iron wood-wild prinet	
II..	LIFE WAY	HINÁÁ AZEE'
⑦.	White Medicine	-azee' łigai
⑧.	seepweeds, red medicine	-azee' łichíí'
⑨.	grom well, black stalk medicine	-azee' hazhinii
⑩.	wild buckwheat, earth medicine	-łe'á ze'
⑪.	bromrape-borrow weed strangler	-łeedool'eez
⑫.	Prairie clover-earth sucker	-níits'sǫǫsii
III.		
⑬.	Blue flowered gilia-eagle medicine	-atsá' azee'
⑭.	cliff rose - buck bush	-awéé' ts'áál
⑮.	Mountain gamot - wild mt. carrot	-chááshł'ezhii
⑯.	Pinon tree	-chá'oł
⑰.	broom week-snake weed-dodge weed	-chił diił yesí
⑱.	chamizo	-do'wízhii łi beí adistsiin zhiin
⑲.	Juniper - cedar	-gad
⑳.	Winter fat - white sweet sage	-gah tsoh dáá' (horse)
㉑.	Leaves like mareposa like (heart pollen)	-iil tsinii yiil t'a'í heart problems
㉒.	Mountain Tobacco - Deer Way	-K'éí łatah dootł'izhi Nat'oh
㉓.	Wild Mountain rice	-nidí dlídii (horse)
㉔.	Star wart plant (snuff)	-nį́i'i' didzih ts'óóz or níí'iinil ts'óó
㉕.	Allergy herb	-nii'ii tsoh ts'óóz
㉖.	gray tobacco-prostitute way tobacco	-Nát'oh łibahí - ajiłeeh notah
㉗.	Indian Paint brush	-Dahiiti'hidáá'
㉘.	Marmon tea	-Tłóh'azihii be'éz hóó'
㉙.	Red grass	-Tłoht'i chíí'
㉚.	grama grass	-Tł'oh nas tasí
㉛.	worm wood sage - water cress	-Tóii káál
㉜.	yucca amole - narrow leaf	-Tsa'azi ists'óóz
㉝.	Spanish layonet - broad leaf	-Tsa' azi niteelí
㉞.	Rock sage	-Tsé'azhíí
㉟.	Purslane - traveling plant	-Tsé yanił chi'ih
㊱.	Among rock sage	-Tsé tah Ts'ah
㊲.	green petaya cactus	-wosh di joolí
㊳.	Candelabrum cactus	-wosh di tsahii
㊴.	yacca glanca	yei'ii bi tsa'izi

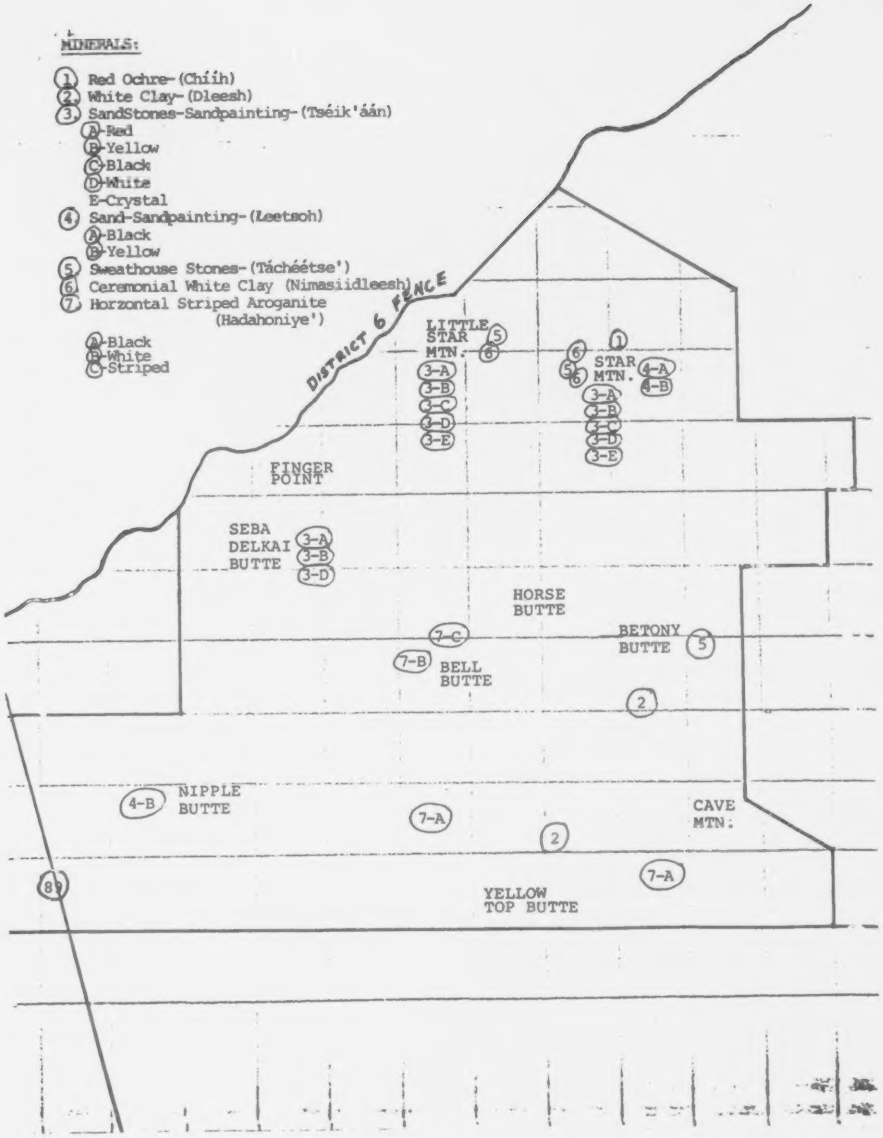
DYES	DYES
㊵. sorrel - rumey	-chą̨ t'inii
㊶. Rayless golden rod	-iiłtsoii - k'iiłtsoii
㊷. Cedar roots	-Tséhatłóól
㊸. Indian Paint brush	-Dahiitíhídą́ą́'

FOOD

㊹. tea	-Déćh
㊺. boxthorn berries	-Haashch'ééhdą́ą́'
㊻. sumac berries	-chiilchin
㊼. Mountain carrots - gamot	-chą̨ąsht'ezhii
㊽. Mild onions	-Tł'ohchin
㊾. Wild mustard seeds	-oostsé'
㊿. White goose foot-pig weeds	-Tł'ohdei
(51). yacca fruits	-Hashk'aan
(52). bee weeds	-waa'
(53). Wild potatoes	-nimasii yazhí
(54). Purple four o'clock	-Tsídídééh
(55). Winter fat - white sweet sage	-gahtsoh dą́ą́'
(56). lamb's quarter	-Tł´ohtsoh (déí)
(57). Mormon Tea	-Tł'ohazihii
(58). fleatane	-Azee'na'ooĺtádii (women)
(59). Lambert Loco weeds - Palmer wild tobacco	-Dibé nat'oh
(60). rounded medicine	-Azee' nimázígii
(61). narrow leaf rubber plant (sweet)	-Azee' hókanii
(62). Pod Rattle (song under tree)	-Tséyánt'i' (star Mnt.)
(63). Leaves like sumac	-chį́įl chįįyit'aa'í

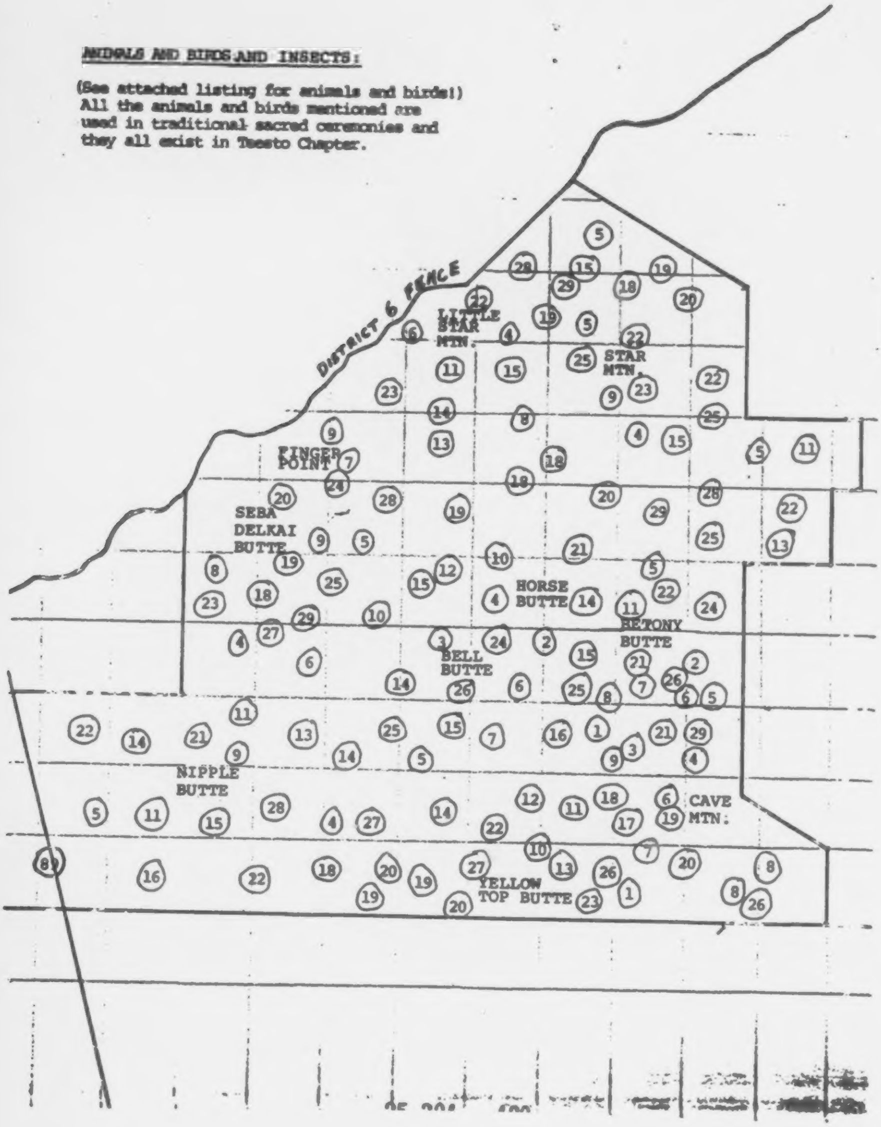
HEART PROBLEM

(64). Life way herb	-iináájí Azee'
(65). Womb herb	-yiishch'id azee'
(66). berro (blue medicine)	-azee' dootł'izh
(67). osha	-nábįįh
(68). prairie flax - New Jersey tea	-dine'e chil baką
(69). blue flax	-dine'e chil be'áád
(70). winding medicine	-azee'ha'oogizii
(71). clover	-nits'oosii ałtsóózí
(72). Smaller specie tea	-déćhał tsííhígíí
(73). Grind oak barks powder (oak ocher)	-chechilbechííh
(74). tree "wart"	-tsin bizid
(75). Pinon tree "wart"	-deestsiin bizid
(76). Insect herb	-Iich'ah azee'
(77). Game way tobacca	-dine'é nát'oh
(78). grom well (small)-(large)	-azee' hajinii
(79). yellow thistle	-azee' dlohii


MINERALS:
① Red Ochre-(Chííh)
② White Clay-(Dleesh)
③ SandStones-Sandpainting-(Tséik'áán)
Ⓐ-Red
Ⓑ-Yellow
Ⓒ-Black
Ⓓ-White
E-Crystal
④ Sand-Sandpainting-(Łeetsoh)
Ⓐ-Black
Ⓑ-Yellow
⑤ Sweathouse Stones-(Táchéétse')
⑥ Ceremonial White Clay (Nimasiidleesh)
⑦ Horzontal Striped Aroganite (Hadahoniye')
Ⓐ-Black
Ⓑ-White
Ⓒ-Striped
DISTRICT 6 FENCE
LITTLE STAR MTN.
⑤
⑥
3-A
3-B
3-C
3-D
3-E
①
⑥
⑤
⑥
STAR MTN.
4-A
4-B
3-A
3-B
3-C
3-D
3-E
FINGER POINT
SEBA DELKAI BUTTE
3-A
3-B
3-D
HORSE BUTTE
7-C
BETONY BUTTE
⑤
7-B
BELL BUTTE
②
4-B
NIPPLE BUTTE
7-A
②
CAVE MTN.
89
7-A
YELLOW TOP BUTTE

ANIMALS AND BIRDS AND INSECTS:

(See attached listing for animals and birds!) All the animals and birds mentioned are used in traditional sacred ceremonies and they all exist in Teesto Chapter.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CAVE MTN.
YELLOW TOP BUTTE

NAMES OF MEDICINEMEN

Nelson Jackson	Native American Church Roadman
Wallace Jackson	Native American Church Roadman
Albert Francis, Jr.	Native American Church Roadman
Justing Lewis	Native American Church Roadman Star Gazer
Arnold Paddock	Hand Trembler Herbolist
Albert Francis Sr.	Hand Trembler Herbolist
Jennie Paddock	Herbolist
Clah Tsosie	Herbolist Hand Trembler
Frank Nez	Coyote way Hand Trembler (use to be) Herbolist Chirocohna Blessing way
Bahe Nelson	Blessing Way Life way
Mark Charley	Nine (9) Night cure Evil Way Enemy Way Enemy Way (Twin Way) Crystal Gazing Sweat bath cure Protection prayer
Harrison Nez	Enemy way
Ross Nez	Mountain Top way Blessing way Sacred Mountain Bundle Native American Church Crystal Gazing
Billy Tso	Smoking Cure
Mary Dickson	Hand Tremble
Edgar Nez	Native American Church Roadman Enemy Way
Cecil Mile	Native American Church Roadman
Jerry Thompson	Native American Church Roadman

Names of Medicineman
page -2-

Robert William	Native American Church Roadman
Paul Duffy	Native American Church Roadman
Jerry Sangster	Native American Church Roadman

The above list of Medicine Men is not complete, due to time restraint.

Includes: Béésist'o'gii, hadahoniye', noolyíní, Tádídíín,
K'eet'áán, nitłiz.

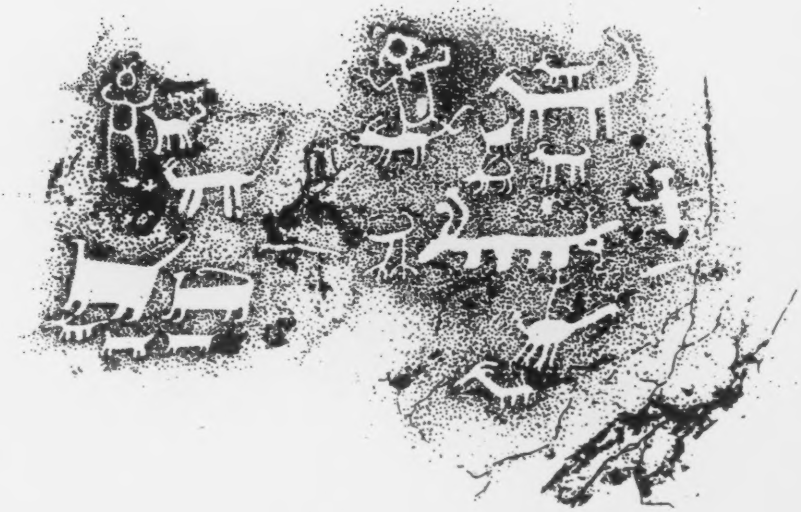
ANIMALS, BIRDS AND INSECTS:

English Names	Navajo Names	Uses
1. Deer	Bįįh	Game Way
2. Eagle	Atsáh	Prayer feathers
3. Wasps	Tsésnáh	Arrowshooting way
4. Thrasher Phoebe	Dibéni'í	Feathers
5. Black bird	Ch'agii	Feathers
6. Greenback Goldfinch	Tsídiiłtsoí	Prayer sticks
7. Mountain bluebird	Dólii	Feathers
8. Owl	Na'ashjaa'	Feathers
9. Crow	Gáagii	Enemy way
10. Red Shafted flicker	At'áhyaałchíí'	Feathes
11. Mocking bird	Zahaláni	Feathers
12. Weasel	Dló'įį	Skin
13. Coyote	Ma'įį	Prayer Offering Skin
14. Porcupine	Dahsání	Prayer sticks
15. Silver Fox	Ma'įį Dootłizhí	9 night chant
16. Kit Fox	Ma'įį Łitsoí	9 night chant
17. Turkey	Tązhii	Feathers
18. Sheep	Dibé	Prayers
19. Cow	Béégashii	Prayers
20. Horse	Łį́į'	Prayers
21. Snakes	Na'ashǫ'įį	Prayer offerings
22. Green Lizard	Na'ashǫ'įį Dootłizhi	Prayer offerings
23. Grey Lizard	Na'ashǫ'įį Łibáhí	Prostitution way
24. Horned Toad	Na'ashǫ'įį Dich'ízhii	Shield Prayer offer
25. Skunk	Gólízhii	Urine
26. Hawk	Giní	Feathers
27. Red-tailed hawk	Atseiłtsoi	Feathers
28. Marsh hawk	chiltaat'agii	Feathers
29. Butterfly	K'aalógii	Pollen

Selected Pages on Native American and Ethnographic Concerns

Management Policies

U.S. Department of the Interior
National Park Service
1988



Selected Pages from NPS Management Policies . 1988 * Native American & ethnographic concerns

2 Park System Planning

The National Park Service will conduct planning activities to evaluate possible additions to the national park system; to identify how park resources will be preserved and how parks will be used and developed to provide for public enjoyment; to facilitate coordination with other agencies and interests; and to involve the public in decision making about park resources, activities, and facilities. NPS plans will represent the Park Service's commitment to the public and to Congress of how parks will be managed.

NEW AREA STUDIES AND CRITERIA

The National Park Service identifies nationally significant natural, cultural, and recreational resources and assists in their preservation both inside and outside the national park system. The areas managed by the National Park Service are only one part of a national inventory of special and protected areas managed by innumerable federal, state, and local agencies and the private sector. Consequently, addition to the national park system is only one of many alternatives for ensuring the preservation of significant national resources for public enjoyment and benefit. A great variety of specially designated areas, including natural landmarks, historic landmarks, wild and scenic rivers, trails, wilderness areas, areas of critical environmental concern, biosphere reserves, and recreation areas, managed by the U.S. Forest Service, Fish and Wildlife Service, Bureau of Land Management, other federal, state, county, and local agencies, native American authorities, and the private sector, complete the broader national inventory. *

As directed by Congress (16 USC 1a-5), the National Park Service will study and monitor areas to determine if they are nationally significant, and if so, whether they have potential for inclusion in the national park system. Planning for the future of the national park system is guided by a framework of themes representing all the aspects of America's natural and cultural heritage. Additions to the system recognize new understanding of natural resources, national recreational trends, and the continuing progression of history. New area studies may be initiated within the Service or may be conducted in response to requests from Congress, other federal, state, or local agencies, or the private sector. The Service will review all proposals and provide advice about planning, studies, or other appropriate actions. Where formal new area studies are appropriate, the Service will establish priorities and conduct studies as funds are available. Studies will include consultation with interested landowners, state and local governments, native American tribes and groups, and other federal agencies.

To be eligible for favorable consideration as a unit of the national park system, an area must (1) possess nationally significant natural, cultural, or recreational resources, (2) be a suitable and feasible addition to the system, and (3) require direct NPS management instead of alternative protection by other agencies or the private sector. These criteria are designed to ensure that the national park system includes only outstanding examples of the nation's natural, cultural, and recreational resources. They also recognize that inclusion in the national park system is not the only option for preserving the nation's outstanding resources.

(See Public Participation in Planning 2:6, Special Designations 4:4, Resource Identification, Evaluation, and Registration 5:1)

Criteria for National Significance

A natural, cultural, or recreational resource will be considered nationally significant if it meets all of the following criteria:

It is an outstanding example of a particular type of resource.

It possesses exceptional value or quality in illustrating or interpreting the natural or cultural themes of our nation's heritage.

It offers superlative opportunities for recreation, public use, and enjoyment or for scientific study.

It retains a high degree of integrity as a true, accurate, and relatively unspoiled example of a resource.

Examples of natural resources that may be nationally significant include

an outstanding site that illustrates the characteristics of a landform or biotic area that is still widespread

a rare remnant natural landscape or biotic area of a type that was once widespread but is now vanishing due to human settlement and development

a landform or biotic area that has always been extremely uncommon in the region or nation

a site possessing exceptional diversity of ecological components (species, communities, habitats) or geologic features (landforms, observable manifestations of geologic processes)

a site containing biotic species or communities whose natural distribution at that location makes them unusual (a relatively large population at the limit of its range, or an isolated population)

a site harboring a concentrated population of a rare plant or animal species, particularly one officially recognized as threatened or endangered

a critical refuge necessary for the continued survival of a species

a site containing rare or unusually abundant fossil deposits

an area with outstanding scenic qualities, such as dramatic topographic features, unusual contrasts in landforms or vegetation, spectacular vistas, or other special landscape features

a site that is an invaluable ecological or geological benchmark due to an extensive and long-term record of research and scientific discovery

Nationally significant cultural resources include districts, sites, buildings, structures, or objects that possess exceptional value or quality in illustrating or interpreting our heritage and that possess a high degree of integrity of location, design, setting, materials, workmanship, feeling, and association. Examples of cultural resources that may be nationally significant include those that

> are associated with events that have made a significant contribution to and are identified with, or that outstandingly represent, the broad national patterns of United States history and from which an understanding and appreciation of those patterns may be gained
>
> are associated importantly with the lives of persons nationally significant in the history of the United States
>
> represent some great idea or ideal of the American people
>
> embody the distinguishing characteristics of an architectural type specimen, exceptionally valuable for study of a period, style, or method of construction; or represent a significant, distinctive, and exceptional entity whose components may lack individual distinction
>
> are composed of integral parts of the environment not sufficiently significant by reason of historical association or artistic merit to warrant individual recognition but collectively composing an entity of exceptional historical or artistic significance; or outstandingly commemorate or illustrate a way of life or culture
>
> have yielded or may be likely to yield information of major scientific importance by revealing new cultures or by shedding light upon periods of occupation over large areas of the United States

Ordinarily, cemeteries, birthplaces, graves of historic figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, and properties that have achieved significance within the past 50 years are not considered appropriate for addition to the national park system unless they have transcendent importance, unless they possess inherent architectural or artistic significance, or unless no other site associated with that theme remains.

Examples of recreation resources that may be nationally significant include

> a natural or cultural feature providing a special setting for a variety of recreational activities different from those available at the local or regional level
>
> a spacious area located near a major population center with the potential to provide exceptional recreational opportunities and to serve visitors from around the nation rather than solely from the immediate vicinity
>
> an area that protects a unique recreation resource that is scarce and disappearing in a multi-state region, such as an outstanding recreational river, a unique maritime environment or coastline, or a unique scenic area
>
> a unique combination of natural, cultural, and recreational resources that collectively offer outstanding opportunities for public use and enjoyment even though each feature might not individually be considered nationally significant

Suitability and Feasibility

An area will be considered suitable for addition to the national park system if it represents a natural/cultural theme or type of recreational resource that is not already adequately represented in the national park system, unless such an area is comparably protected and presented for public enjoyment by another land-managing entity. Adequacy of representation will be determined on a case-by-case basis by comparing the proposed addition to other units in the national park system, considering differences or similarities in the character, quality, quantity, or combination of resources and opportunities for public enjoyment.

To be feasible as a new unit of the national park system an area must be of sufficient size and appropriate configuration, considering natural systems and/or historic settings, to ensure long-term protection of resources and to accommodate public use, and it must have potential for efficient administration at a reasonable cost. Important feasibility factors include landownership, acquisition costs, access, threats to the resource, and staff or development requirements.

(See Hazardous Materials and Toxic Waste 9:6)

Management Alternatives

Studies of potential new park units will evaluate an appropriate range of management alternatives, which may include

* continued management by states, local governments, native American authorities, the private sector, or other federal agencies

technical or financial assistance to others through established NPS programs or special projects

management by others as a designated national natural landmark, national historic landmark, national wild and scenic river, national trail, biosphere reserve, state or local park, or other specially designated and protected area

cooperative management involving joint efforts by the National Park Service and other entities

New additions to the national park system will not usually be recommended if other arrangements can provide adequate protection for the resource and opportunities for public enjoyment.

Authorization

Studies by the National Park Service provide information for consideration by Congress in deciding whether a new unit should be authorized or whether some other form of protection and management is most appropriate. NPS studies may include suggestions about what uses should be permitted, prohibited, or allowed subject to certain conditions in a potential new unit. Specific direction on these issues is often provided in the text of the act, the legislative history, or the designation when Congress establishes a new unit.

PARK PLANNING PROCESS AND PRODUCTS

Planning will be conducted as a dynamic, continuous process for making choices about how to accomplish the National Park Service's preservation and enjoyment mandates. This process will include the gathering and analysis of data, an assessment of existing conditions and future trends, the identification of issues that need to be addressed, an evaluation of alternative actions, and the selection of a preferred alternative. Formal planning projects will generally result in the preparation of documents for use by NPS employees, the public, and the Congress. In addition, the planning process is an important problem-solving tool that will often be used in day-to-day operations and management. Specific guidance is provided in the *Planning Process Guideline* (NPS-2).

(See Planning and Proposal Formulation 5:4)

Statement for Management

Each park will prepare a statement for management, which will be evaluated by the superintendent and the regional director every two years and revised as necessary. This document will compile information about the park's purpose, the nature and significance of its resources, the existing uses of its lands and waters, its regional context and adjacent land considerations, the legislative and administrative requirements for its management, the influences on park resources and the experience of park visitors, and nonrecreational park use by native Americans and others. This information will be used to identify major issues and problems that need to be addressed, to determine needs for additional information, and to establish park management objectives, all of which will also be included in the statement for management.

The statement for management will assess existing conditions without identifying solutions. The management objectives established in the statement for management will describe the conditions that need to be achieved to realize the park's purpose consistent with NPS policy. The discussion of issues will describe the problems that need to be addressed.

(See Chapter 1: Introduction)

Outline of Planning Requirements

Upon completion of the statement for management, an analysis will be undertaken of the plans and tasks needed to address issues, gather information, and achieve objectives. The results of this analysis will be included in the outline of planning requirements, a programming document that will be reviewed annually by the superintendent and the regional director and updated as necessary. This document will contain a priority listing of the studies and surveys needed to produce an adequate information base for planning and compliance, and the plans and designs needed for the park. This listing will ensure a logical sequence of task programming and accomplishment.

(See Planning Priorities 2:6)

Information Base

Sufficient information will be available prior to initiating a plan. Each park will develop, gather, compile, store, analyze, and update information about natural and cultural resources and regional demographic, ethnographic, and socioeconomic data relevant to planning and management. These data will serve as an information base for formulating proposals, evaluating alternatives, and making decisions during planning. Acquisition of adequate information for planning and management decisions will be a prerequisite to the allocation of planning funds. Parks and regional offices will work together to ensure that information-gathering projects needed for plans scheduled to begin in two to five years are programmed and funded.

(See Science and Research 4:2, Inventory and Monitoring 4:4, Resource Identification, Evaluation, and Registration 5:1, Research 5:2, Ethnographic Research and Inventories 5:12)

Public Participation in Planning

Throughout the planning process, opportunities will be provided for the public at the national, regional, and local levels to voice their concerns about planning and management of parks. Certain consultations with specific parties and agencies are required by law, regulation, and NPS policies. In addition, positive actions will be taken to identify and involve the public as individuals and through public interest groups and organizations at the earliest possible stages in the planning process and before planning decisions have been made. Those involved will include federal agencies, state and local governments, regional planning commissions, native Americans, state historic preservation officers, state liaison officers, advisory organizations, concessioners, park users and their associations, owners and users of adjacent lands, and other interested parties. Opportunities for public participation may include public workshops and meetings, informal work sessions on particular issues, and public review and comment on draft documents.

(See Facility Planning and Design 9:1)

General Management Plan

Each park will have an approved general management plan (GMP) which will set forth a management concept for the park; establish a role for the unit within the context of regional trends and plans for conservation, recreation, transportation, economic development, and other regional issues; and identify strategies for resolving issues and achieving management objectives, usually within a period of 15 years. All other plans will be consistent with the direction established in this lead planning document. Until a GMP is completed and approved, the management objectives established by the statement for management will guide day-to-day operations. No new development or major rehabilitation will be undertaken without an approved GMP. The GMP components will be reviewed periodically and revised or amended as necessary to reflect new issues or changes in management objectives.

Planning Priorities. The Director and the regional directors will establish and periodically review a servicewide priority list of GMPs that need to be undertaken. Congressionally directed plans will be given a priority that enables their completion within the required time frame.

Planning Team. General management planning will be conducted by an interdisciplinary team of planning professionals and park managers. Superintendents will have the major responsibility of directing planning efforts in their parks and will actively participate in all aspects of plan preparation. The team will include specialists with expertise to address the park-specific planning concerns. Staff from the Denver Service Center, the regional office, the Harpers Ferry Center, other field offices, and the park may be part of the planning team. Staff from other affected government agencies and others possessing specialized knowledge of the park or special expertise may serve as advisors to the planning team.

Evaluation of Alternatives. As required by the National Environmental Policy Act (42 USC 4371 et seq.), during the planning process a range of alternatives will be formulated to evaluate distinct management approaches for dealing with the issues. All GMPs and their accompanying environmental documents will consider no-action and other reasonable alternatives. Innovative, practical, and cost-effective solutions to the issues will be contained in the alternatives.

The environmental assessment or environmental impact statement will describe the potential environmental and other impacts of the alternatives. Planners and managers will consider these potential impacts before deciding which actions to implement. Potential environmental effects, resource protection, visitor safety, visitor use and enjoyment of park resources, interests of park-associated communities and groups, and short- and long-term cost-effectiveness will be important considerations in the selection of proposed actions. These considerations will be included in the environmental document accompanying the GMP so that decision makers and the public can clearly understand the issues and the rationale for decision making. If the actions proposed in the plan constitute a major federal action significantly affecting environmental quality, an environmental impact statement will be prepared. Specific guidance for analyzing environmental impacts and preparing environmental impact statements is provided in the *National Environmental Policy Act Guideline* (NPS-12).

Management Zoning. The general management plan will prescribe a system of management zoning for park lands and waters to designate where various strategies for management and use will best fulfill management objectives and achieve the purpose of the park. The delineation of management zones will be based on an evaluation of the congressionally established purposes of the park; the nature of the park's natural and cultural resources; all past, existing, and anticipated uses; and park management objectives. This prescriptive zoning will consider the capability of lands to support identified uses and will be used as a framework for specific planning and management decisions on use and development of the park. The management zoning system will recognize that different types of parks have different purposes and consequently should be managed differently. For example, recreation areas, preserves, riverways, and seashores are generally managed to provide for a wider range of public recreational uses than are parks or monuments.

Four primary management zones will be identified: natural, cultural, park development, and special use. Within this framework, subzones may be designated for any park where it is useful to indicate in greater detail how the land or water will be managed. Subzones will be used to focus management on specific types of protection, use, or development as necessary to achieve the park-to-park distinctions in management emphasis called for by Congress in enabling legislation. Subzones will also be used to distinguish the particular resource values and use potentials of various areas within parks. Numerous management subzones are defined in chapter 5 of the *Planning Process Guideline*.

Zones and their basic management strategies are described below. Depending on the particular resources present in each zone, other management strategies may also apply.

Natural Zone: This zone will include lands and waters that will be managed to conserve natural resources and ecological processes and to provide for their use and enjoyment by the public in ways that do not adversely affect these resources and processes. Development in the natural zone will be limited to dispersed recreational and essential management facilities that have no adverse effect on scenic quality and natural processes and that are essential for management, use, and appreciation of natural resources. Examples of typical facilities include trails, signs and trailside information displays, walk-in primitive shelters, walk-in storage facilities, stream-gauging devices, weather stations, and small-boat docks. Types of natural subzones include outstanding natural area, natural environment, protected natural area, wilderness, research natural area, and special management.

Cultural Zone: This zone will include lands that will be managed for the preservation, protection, and interpretation of cultural resources and their settings and to provide for their use and enjoyment by the public. Cultural resources that are key to the purposes of the park will be included in this zone. Other cultural resources, including properties listed or eligible for listing in the National Register of Historic Places, along with resources not eligible for the register but worth preserving for interpretive or other management purposes, will be included in the zone that best reflects the primary management emphasis of their particular area of the park. Development in the cultural zone must be compatible with preservation and interpretation of cultural values. Consistent with policies for preservation and use of cultural resources, historic structures may be adaptively used for utilitarian or other purposes. Types of cultural subzones include preservation, adaptive use, and commemoration.

Park Development Zone: This zone will include lands that will be managed to provide and maintain facilities serving park managers and visitors. It will include areas where park development or intensive use may substantially alter the natural environment or the setting for culturally significant resources. Impacts associated with such development will be mitigated to the greatest extent possible. The development zone will encompass the facilities themselves and all associated lands directly modified as a result of their continuing management and use. Development zones will be restricted to the smallest area necessary to accommodate required development and use. New development zones will be established only after considering alternative sites (including locations outside the park and locations outside areas with significant natural and cultural resources) and alternative levels of use, facilities, and services. Types of park development subzones include administrative development, visitor support, and landscape management area.

Special Use Zone: This zone will include lands and waters that the National Park Service anticipates will continue to be used for activities not appropriate in other zones. Types of special use subzones include commercial, exploration/mining, grazing, forest utilization, and reservoir.

(See Basic Management Concepts 4:1, Rights-of-Way 8:11, Mineral Development 8:12, Agricultural Uses 8:14, Grazing 8:14; also see individual zones in the Index)

Scope of the GMP. Every general management plan will include interrelated proposals for resource protection and management, land protection, cooperation with associated local interests, interpretation, visitor use, native American activities, accessibility for disabled visitors, carrying capacities, and park operations, along with a general indication of location, size, capacity, and function of physical developments. A plan implementation schedule and cost estimates will be included. Other elements that may be added to GMPs include development concept plans, land protection plans, boundary studies, land suitability analyses, wilderness suitability reviews, and detailed strategies for access and circulation, resource management, mineral management, and interpretation. Such planning guidance may be incorporated into the general management plan or separated into individual studies or implementation plans.

(See Implementation Plans 2:9)

Boundary Studies

Congress has specifically directed the National Park Service to consider, as part of the planning process, what modifications of external boundaries might be necessary to carry out park purposes (16 USC 1a-7(b)(4)). The National Park Service will conduct studies of potential boundary adjustments and may recommend boundary revisions

> to include significant resources or opportunities for public enjoyment related to the purposes of the park
>
> to address operational and management issues such as access and boundary identification by topographic or other natural features or roads
>
> to protect park resources critical to fulfilling the park's purposes

Recommendations to expand park boundaries will be preceded by determinations that

> the added lands will be feasible to administer considering size, configuration, ownership, costs, and other factors
>
> other alternatives for management and resource protection are not adequate

Where a boundary adjustment appears to be appropriate, the National Park Service will recommend it to the Secretary of the Interior for legislative or administrative action. Congressional action is required for boundary adjustments; however, in some cases the Secretary may make minor boundary adjustments where authorized by existing law without additional congressional action.

Implementation Plans

Following approval of a GMP, the park's outline of planning requirements will be updated to guide plan implementation. The GMP is a comprehensive plan that will vary in detail with the size and complexity of a given park. In most instances, more detailed plans and studies will be prepared for subjects that are only generally addressed in the GMP. All implementation plans will be consistent with the GMP.

Examples of implementation plans include development concept plans, land protection plans, wilderness management plans, resource management plans, mineral management plans, concession management plans, backcountry management plans, interpretive prospectuses, special resource studies, collection management plans, historic structure reports, and exhibit plans. These plans will be prepared in accordance with guidelines developed by staff in the respective program areas.

(See Land Protection Plans 3:1, Planning for Natural Resource Management 4:2, Planning and Proposal Formulation 5:4, Wilderness Management Plan 6:4, Interpretive Plans and Documents 7:2, Facility Planning and Design 9:1, Concession Planning 10:1; see also listing under Plans in the Index)

PARK PLANNING IN A REGIONAL CONTEXT

Many park management and resource protection issues are not confined by park boundaries. Since park boundaries may not incorporate all of the natural resources, cultural sites, and scenic vistas that relate to park resources or the quality of the visitor experience, the activities on adjacent lands may significantly affect the success of park programs. Furthermore, the activities of the National Park Service may have effects outside the boundaries of the parks. Recognizing that parks are integral parts of larger regional environments, the National Park Service will work cooperatively with others to anticipate, avoid, and resolve potential conflicts, to protect park resources, and to address mutual interests in the quality of life for community residents, considering economic development as well as resource and environmental protection. Such regional cooperation will involve federal, state, and local agencies, native American authorities, neighboring landowners, and all other concerned parties.

Through planning, parks will be considered within the broader context of the surrounding region. Cooperative regional planning will be undertaken to integrate parks into their regional environments and to address adjacent land use issues that influence park resources. This will occur on an ongoing basis as well as during the development of general management plans and other plans. Information on the status of cooperative regional planning will be included in each park's updated statement for management. Joint agency planning is especially important when a park is adjoined by Indian reservations, other federal lands, state lands, or lands subject to state, regional, or local planning or regulation. Where appropriate, formal agreements will be pursued with landowners, land use planners, and managers of these lands. Early coordination on specific proposals and projects will occur to ensure that various points of view are considered in formulating proposals and that potential conflicts are identified and avoided or resolved if possible.

Superintendents will work with neighboring landowners on topics of mutual interest and will explore ways of providing technical assistance to neighboring landowners. The National Park Service will be sensitive to the influences and impacts that its management of park lands may have on adjacent landowners, and it will seek to enhance beneficial effects and to mitigate adverse effects in whatever ways are consistent with its policies and management objectives. NPS participation in regional planning is not intended to prevent reasonable uses of the land and will be undertaken with attention to the rights of other landowners.

While the National Park Service does not propose to create buffer zones around parks, it will use all available authorities to protect park resources and values from potentially harmful activities. Superintendents will be aware of what uses are planned on adjacent lands. They will seek to encourage compatible adjacent land uses and to mitigate potential adverse effects on park values by actively participating in planning and regulatory processes of neighboring jurisdictions, other federal, state, and local agencies, and native American authorities.

(See Natural Resource Management 4:1, Biosphere Reserves 4:4, Cooperation with Others 4:5, General Policy 6:3, Interpretation and Native Americans 7:5, Management of Recreational Use 8:2, Emergency Preparedness and Emergency Operations 8:6, Location 9:1, Access and Circulation Systems 9:7; see also listing under Cooperation and Consultation in the Index)

4 Natural Resource Management

The National Park Service will manage the natural resources of the national park system to maintain, rehabilitate, and perpetuate their inherent integrity.

The natural resource policies of the National Park Service are aimed at providing the American people with the opportunity to enjoy and benefit from natural environments evolving through natural processes minimally influenced by human actions. The natural resources and values that the Park Service protects are described in the 1916 NPS organic act (16 USC 1 et seq.) and in the enabling legislation or executive orders establishing the parks. These resources and values include plants, animals, water, air, soils, topographic features, geologic features, paleontologic resources, and aesthetic values, such as scenic vistas, natural quiet, and clear night skies. Some of these resources and values are protected both by NPS authorities and by other statutory authorities, such as the Clean Air Act (42 USC 7401 et seq.), the Clean Water Act (33 USC 1251 et seq.), the Endangered Species Act (16 USC 1531 et seq.), the National Environmental Policy Act (42 USC 4321 et seq.), and the Wilderness Act (16 USC 1131 et seq.).

The National Park Service is committed to working cooperatively with federal, state, and local agencies, native American authorities, user groups, adjacent landowners, and others in the management of natural resources and will seek to establish formal and informal lines of communication and consultation in order to better achieve park management objectives. *

(See Park Planning in a Regional Context 2:9)

GENERAL

Basic Management Concepts

Management of natural systems will be based on a park's management zones as established in an approved statement for management or general management plan.

Natural Zones. The primary objective in natural zones will be the protection of natural resources and values for appropriate types of enjoyment while ensuring their availability to future generations. Natural resources will be managed with a concern for fundamental ecological processes as well as for individual species and features. Managers and resource specialists will not attempt solely to preserve individual species (except threatened or endangered species) or individual natural processes; rather, they will try to maintain all the components and processes of naturally evolving park ecosystems, including the natural abundance, diversity, and ecological integrity of the plants and animals.

Just as all components of a natural system will be recognized as important, so will change be recognized as an integral part of the functioning of natural systems. The National Park Service will not seek to preserve natural systems in natural zones as though frozen at a given point in time.

Interference with natural processes in park natural zones will be allowed only (1) when directed by the Congress, (2) in some emergencies when human life and property are at stake, or (3) to restore native ecosystem functioning that has been disrupted by past or ongoing human activities.

Ecological processes altered in the past by human activities may need to be abetted to maintain the closest approximation of the natural ecosystem where a truly natural system is no longer attainable. Prescribed burning is an example. The extent and degree of management actions taken to protect or restore park ecosystems or their components will be determined in light of management objectives and prevailing scientific theory and methodologies.

Naturally evolving plant and animal populations, and the human influences on them, will be monitored to detect any significant unnatural changes. Action will be taken in the case of such changes based on the type and extent of change and the appropriate management policy.

In the natural zone, and in the other zones as well, there may be situations in which an area may be closed to visitor use to protect the resources (for example, during an animal breeding season) or for reasons of public safety (for example, during a wildfire). This may be accomplished under the superintendent's discretionary authority (36 CFR 1.5).

Cultural Zones. The primary resource management objectives in cultural zones are to preserve and foster appreciation of the cultural resources. The management of their natural resources will support these cultural resource objectives. Where compatible with cultural resource objectives, the policies for natural zones will be followed.

Park Development Zones. Park development zones are managed and maintained for intensive visitor use. Accordingly, roads, walks, buildings, and other visitor and management facilities may occupy much of the zones, and the natural aspect of the land in the zones may be altered. In development zones adjacent to natural zones, management will aim at maintaining as natural an environment as possible, given the use of the zone. Such management may involve the manipulation of natural resources, but any manipulation will be the minimum necessary to achieve the planned use.

(See Management Zoning 2:7)

Planning for Natural Resource Management

Each park with natural resources to manage will prepare and periodically update a natural resource component for its resource management plan. The plan will identify, define, and program the monitoring, inventory, research, mitigation, and enforcement activities required to perpetuate park natural resources and natural processes, achieve the park's purposes and objectives, and regulate the use of the park.

(See Implementation Plans 2:9)

Science and Research

A program of natural and social science research will be conducted to support NPS staff in carrying out the mission of the National Park Service by providing an accurate scientific basis for planning, development, and management decisions.

The science program will be focused on applied research necessary to direct management actions in pursuit of park objectives as stated in legislation and planning documents. This research may involve the pursuit of new facts and principles when problems arise for which no current solutions exist or when the collection of baseline inventory data must precede the identification of appropriate management actions. Basic research may also be necessary to correctly interpret resources whose functioning and significance are not already known.

(See Information Base 2:5, Research Natural Areas 4:4, Paleontologic Resource Management 4:19, Research 5:2, Ethnographic Research and Inventories 5:12, Research 6:6)

Relationship to Planning and Management. Park research needs will be documented in each park's resource management plan. Research will be conducted to further park objectives as found in legislation and planning documents. Research activities will

provide a sound basis for policy and guidelines

develop effective strategies to avoid or minimize adverse impacts on resources and visitors

determine causes of resource management problems

predict impacts of resource uses and related activities

develop methods to restore damaged resources

further understanding of ecosystems and document their components, condition, and significance

Conduct of Research. The National Park Service will cooperate with research institutions to establish cooperative park study units (CPSUs) where specialized expertise exists which can be of significant assistance to the Service in conducting research and where the opportunity for research and study in the parks offers the institution an equally significant benefit to its programs.

In recognition of the scientific value of parks as natural laboratories, investigators will be encouraged to use the parks for scientific studies when such use is consistent with NPS policies. Research activities that might disturb resources or visitors, that require the waiver of any regulation, or that involve the collection of specimens may be allowed only pursuant to the terms and conditions of an appropriate permit. Manipulative or destructive research activities generally will not be permitted within parks. Exceptions may be granted if the impacts will be short-lived, the park is the only area where such research can be conducted, the value of the research is greater than the resource impacts, or the research is essential to provide information for resource management.

(See Research and Collection Activities 8:15, Miscellaneous Management Facilities 9:16)

Publication of Research Data. The results of all scientific activities conducted in the parks will be made available to park managers, the scientific community, and the public through both technical publications and popular media. NPS scientists will be encouraged to publish their research findings in refereed journals as well as to include such findings in public interpretive programs. Information on the locations of extremely fragile natural resources or those subject to vandalism will not be included in final studies and reports for public distribution.

Inventory and Monitoring

The National Park Service will assemble baseline inventory data describing the natural resources under its stewardship and will monitor those resources at regular intervals to detect or predict changes. The resulting information will be analyzed to detect changes that may require intervention and to provide reference points for comparison with other, more altered environments.

(See Weather and Climate 4:19, Miscellaneous Management Facilities 9:16)

Natural Resource Collections

Natural resource collections include nonliving and living specimens and associated field records. If placed in exhibits or retained in permanent collections, nonliving specimens and their associated field records will be cataloged into a park's museum collection. Management standards for such collections are specified in the *Cultural Resources Management Guideline* (NPS-28) and the *Museum Handbook*. Living collections will be managed in accordance with the provisions of a park's resource management plan.

(See Museum Objects and Library Materials 5:9)

Special Designations

Research Natural Areas. Prime examples of natural ecosystems and areas with significant genetic resources with value for long-term baseline observational studies or as control areas for comparative studies involving manipulative research outside the park may be recommended by superintendents to the Director for designation as research natural areas. Superintendents will cooperate with other federal land managers in identifying park sites for designation and in planning research and educational activities for this interagency program.

Research natural areas will be managed to provide the greatest possible protection of site integrity in accordance with their designation. Activities in research natural areas will be restricted to nonmanipulative research, education, and other activities that will not detract from the area's research values.

National Wild and Scenic Rivers System. Parks containing one or more river segments listed in the National Rivers Inventory maintained by the National Park Service will comply with the August 2, 1979, presidential directive instructing each federal agency to assess whether those rivers are suitable for inclusion in the wild and scenic rivers system. Such assessments may be incorporated into a park's general management plan or resource management plan.

National Natural Landmarks. Park geologic or ecological sites that best characterize a natural region will be nominated to the Secretary of the Interior for inclusion in the National Registry of Natural Landmarks. As the agency responsible for maintaining the registry, the National Park Service has developed criteria for eligibility (FR 45:81184-93).

Biosphere Reserves. Individual park ecosystems or park lands that are components of regional ecosystems believed to be internationally significant examples of one of the world's natural regions may be nominated for designation as biosphere reserves. General guidance for the international biosphere reserve program is provided by the United Nations Education, Scientific and Cultural Organization (UNESCO) through its Man and the Biosphere (MAB) program. Working within the U.S. MAB program, the National Park Service will assist in determining the suitability and feasibility of including parks in U.S. biosphere reserve nominations, participate in research and educational activities, and furnish information on its biosphere reserves for inclusion in domestic and international information systems.

The designation of park lands as international biosphere reserves will not alter the purposes for which the parks were established or change the management requirements. To the extent practicable, superintendents of parks participating in the international network will incorporate biosphere reserve objectives into statements for management, general management plans, action plans, and park interpretive programs. Superintendents will pursue opportunities to use the biosphere reserve network as a framework for local, regional, and international cooperation.

World Heritage Sites. Natural areas believed to possess outstanding universal value as part of the world's natural heritage will be nominated to the World Heritage List. U.S. recommendations are approved by an interagency panel chaired by the Assistant Secretary for Fish and Wildlife and Parks, based on criteria promulgated by the World Heritage Committee. These criteria and the rules for U.S. participation in the Convention Concerning the World Cultural and Natural Heritage are published in 36 CFR 73. Once an area is designated a world heritage site, the National Park Service will recognize the designation in public information and interpretive programs.

(See World Heritage Site Designation 5:2)

Cooperation with Others

The National Park Service will pursue opportunities to improve resource management by cooperating with public agencies, native American authorities, and private landowners. Recognizing that cooperation with other land managers can accomplish ecosystem-stability and other resource management objectives where the best efforts of a single manager might fail, superintendents will develop agreements with other federal, state, and local agencies, native American authorities, and private landowners where appropriate to coordinate plant and animal management activities. Such cooperation may involve coordinating management activities in two or more separate areas, integrating management practices to reduce conflicts, coordinating research, sharing data and expertise, exchanging resources through transplants, establishing native wildlife corridors, and providing essential habitats adjacent to park boundaries.

In addition, superintendents will seek the cooperation of others in minimizing the impacts of outside influences – controlling noise, maintaining water quality and quantity, eliminating toxic substances, preserving scenic views, improving air quality, preserving wetlands, protecting threatened or endangered species, eliminating exotic species, managing use of pesticides, protecting shoreline processes, managing fires, and other means of preserving and protecting park resources.

BIOLOGICAL RESOURCE MANAGEMENT

Animals

Protection of Native Animals. The National Park Service will seek to perpetuate the native animal life (mammals, birds, reptiles, fish, insects, worms, crustaceans, etc.) as part of the natural ecosystems of parks. Management emphasis will be on minimizing human impacts on natural animal population dynamics. The native animal life is defined as all animal species that as a result of natural processes occur or occurred on lands now designated as a park. Any species that have moved onto park lands directly or indirectly as the result of human activities are not considered native.

Native animal populations will be protected against harvest, removal, destruction, harassment, or harm through human action. Individual animals within a population may be removed only when

hunting and trapping are permitted by law

fishing is not specifically prohibited

control of specific animal populations is required for park ecosystem maintenance

removal or control of animals is necessary for human safety and health or to protect property or landscaped areas

removal is part of an NPS research project described in an approved resource management plan or is part of research being conducted by others who have been issued an appropriate collection permit

removal will restore native populations in other parks or cooperating areas without diminishing the viability of the populations from which the animals are taken

(See Science and Research 4:2, Population Management 4:6, Management of Harvested Species 4:7, Fisheries Management 4:7, Genetic Resources 4:10, Fishing 8:4, Hunting and Trapping 8:4, Research and Collection Activities 8:15)

Population Management. Natural processes will be relied on to control populations of native species to the greatest extent possible. Unnatural concentrations of native species caused by human activities may be controlled if the activities causing the concentrations cannot be controlled. Nonnative (exotic) species will not be allowed to displace native species if this displacement can be prevented by management.

Animal populations or individuals will be controlled in natural, cultural, and development zones when they present a direct threat to visitor safety and health, and in cultural and development zones when necessary to protect property or landscaped areas. The decision to initiate a control program will be based on scientifically valid resource information obtained through research. Planning and implementation of control actions will comply with established planning procedures, including provisions for public review and comment. Where persistent human/animal conflict problems exist, a determination will be made of whether or not curtailing or modifying visitor use and other human activities might be a more desirable alternative. The need for, and results of, controlling animal populations will be evaluated and documented by research studies and in the natural resource management plan. Such studies will assess the impacts of the control methods on nontargeted as well as targeted components of the ecosystem.

Other management measures that may be used as necessary separately or together include live trapping for transplanting elsewhere, gathering of research specimens for NPS and cooperating scientists, public hunting on lands outside the park, habitat management, predator establishment, sterilization, and destruction by NPS personnel or their authorized agents. In controlling wildlife populations, highest priority will be given to encouraging public hunting outside the parks and live trapping within parks for transplanting elsewhere.

✳ The National Park Service will consult, as appropriate, with other federal land-managing agencies, the U.S. Fish and Wildlife Service, state agencies, native American authorities, and others regarding programs to control populations of fish and wildlife, research programs involving the taking of fish and resident wildlife, and cooperative studies and plans to guide public hunting outside park boundaries.

In cases where individual animals are removed from park populations consistent with these provisions, carcasses may be left in natural zones to decompose, or live animals or carcasses may be removed from parks, according to provisions of applicable laws, agreements, and regulations, including the giving of preference to native Americans.

(See Basic Management Concepts 4:1, Science and Research 4:2, Genetic Resources 4:10, Research and Collection Activities 8:15)

Management of Migratory Animals. Many species of vertebrates and invertebrates regularly travel from one location to another at yearly or other intervals. Such species have at least two significant habitat areas, and those that spend time en route may have three or more. Where those species occur in a park, park habitats provide only one of the major habitat needs, and the survival of the species in the park is also dependent on the existence and quality of habitats outside the park.

Parks having native migratory species (bats, caribou, geese, marine turtles, elk, frogs, salmon, whales, and butterflies, to name a few) will ensure the preservation of their populations and their habitats inside the park and will cooperate wherever possible with others to ensure the preservation of their populations and habitats outside the park. Management actions may include

> participation in regional land use planning efforts and cooperation with states and native American authorities in the setting of game harvest regulations for lands outside the park (useful for managing short-distance seasonal migrants, such as elk)
>
> monitoring to develop data for the U.S. Fish and Wildlife Service and National Marine Fisheries Service (useful in international negotiations for far-ranging seasonal migrants, such as geese, whales, and marine turtles)
>
> presentation of information about species' life cycles, ranges, and population dynamics in park interpretive programs (useful for managing all species that frequently move into and out of parks)

Management of Harvested Species. Hunting and trapping wildlife will be allowed only in parks where such use is specifically authorized. In areas set aside with legal authorization for hunting, trapping, fishing, subsistence use, or other harvest of native wildlife, the National Park Service will still seek to perpetuate native animal life and to protect the integrity of natural ecosystems. Management programs directed toward the restoration and maintenance of habitats supporting such animals (including fish, amphibians, insects, mammals, birds, mollusks, echinoderms, and crustaceans) will be conducted through cooperative efforts with individual states under memoranda of understanding. The restoration of habitat will generally include treatment to return a damaged area to its natural condition, which will then be self-perpetuating. It will not include the continued artificial manipulation of habitat to increase the numbers of a harvested species above natural levels, except where directed by Congress.

(See *Hunting and Trapping* 8:4)

Fisheries Management. Fishing may be restricted in certain waters and at certain times if it is determined such actions are needed

> to protect rare, threatened, or endangered plant or animal species in the waters or in adjacent habitat
>
> to meet park objectives for scientific study, interpretation, environmental education, appreciation of fish and other aquatic life, or other public benefits
>
> to provide opportunities for depressed fisheries to recover

to protect spawning grounds of endemic fish species

to maintain natural distributions, densities, age-class distributions, and behavior of fish or of native wildlife species that use fish for food

to protect the natural integrity of aquatic areas within natural zones

In natural, cultural, and park development zones, fisheries management will seek to preserve or restore natural aquatic habitats and the natural abundance and distribution of native aquatic species, including fish, together with the associated terrestrial habitats and species. In these zones, waters that are naturally barren of fish will not be stocked with any species. Artificial stocking of native fish will be employed in natural zones only to reestablish native species in their historic ranges; stocking of exotic fish species will not be permitted in natural zones. Stocking of native or exotic species will be permitted in cultural zones only where there is a special need associated with the historic events or individual commemorated and where an exotic species, if used, could not spread to natural zones or waters outside the park. Stocking with native species, but not with exotic species, will be permitted in park development zones. Stocking programs for other purposes in these zones will be discontinued or phased out except where there is congressional intent expressed in law or a House or Senate report accompanying legislation.

Reservoirs, and in some cases channelized or otherwise manipulated rivers and streams, in special use zones represent altered environments that may reduce populations of some native species of fish and encourage others. The National Park Service may cooperate with state fish and game officials to work out programs of stocking reservoirs and other altered waters, where authorized, for purposes of recreational fishing, using either exotic or native species, or both. Active fishery management programs will be encouraged in such waters.

The new ecological environments and niches created by the alteration of natural waterways may be most successfully filled by exotic fish species; nevertheless, management activities will give precedence to native species over exotics wherever natives are adaptable to the altered environment. Rivers and streams in special use zones may be stocked with exotic species of fish only when it has been determined that exotics already are present and established and where scientific data indicate that introducing additional exotics would not diminish native plant and animal populations and that the exotics could not spread to natural zones or to waters outside the park.

(See Basic Management Concepts 4:1, Genetic Resources 4:10, Exotic Plants and Animals 4:11, Fishing 8:4, Dams and Reservoirs 9:16)

Landscapes and Plants

The National Park Service will seek to perpetuate native plant life as part of natural ecosystems. Landscapes and plants may be manipulated only when necessary to achieve approved management objectives. These objectives will vary according to management zones, as described below. To the maximum extent possible, plantings in all zones will consist of species that are native to the park or that are historically appropriate for the period or event commemorated. Only native species will be allowed in natural zones. Use of exotic species in other zones will conform to the exotic species policy. In any zone, landscapes and plants may be manipulated to maintain habitat for threatened or endangered species, but in natural zones only native plants may be used if additional plantings are done, and manipulation of existing plants will be carried out in a manner designed to restore or enhance the functioning of the plant and animal community of which the endangered species is a natural part.

(See Threatened and Endangered Plants and Animals 4:11, Exotic Plants and Animals 4:11, Collecting Natural Products 8:15)

5 Cultural Resource Management

The National Park Service will preserve and foster appreciation of the cultural resources in its custody through appropriate programs of research, treatment, protection, and interpretation.

All NPS programs affecting cultural resources are subject to the provisions of the National Historic Preservation Act (16 USC 470 et seq.), the National Environmental Policy Act (42 USC 4371 et seq.), the American Indian Religious Freedom Act (42 USC 1996), the Advisory Council on Historic Preservation's regulations regarding "Protection of Historic Properties" (36 CFR 800), the Secretary of the Interior's "Standards and Guidelines for Archeology and Historic Preservation" (FR 48:44716-40), and "Federal Agency Responsibilities under Section 110 of the National Historic Preservation Act" (FR 53:4727-46). Other applicable legislation and regulations and specific management procedures are detailed in the *Cultural Resources Management Guideline* (NPS-28).

RESOURCE IDENTIFICATION, EVALUATION, AND REGISTRATION

The National Park Service will identify and evaluate the cultural resources of each park as required parts of the park's information base. The resulting inventories will provide the substantive data for nominating resources to the National Register of Historic Places; for general park planning and specific cultural resource management proposals; for land acquisition, development, interpretation, and maintenance activities; and for compliance with legal requirements.

(See Information Base 2:5)

Inventories

The following cultural resource inventories will be maintained for the national park system: (1) a List of Classified Structures encompassing historic and prehistoric structures; (2) a Cultural Sites Inventory consisting of both prehistoric/historic archeological resources and ethnographic resources (cultural and natural) associated with contemporary native Americans and other ethnic groups; and (3) a National Catalog of Museum Objects encompassing all cultural and natural history objects in NPS collections.

(See Information Base 2:5, Museum Objects and Library Materials 5:9, Ethnographic Research and Inventories 5:12)

Evaluation and Categorization

To assist in management decisions about the treatment and use of cultural resources, all resources will be professionally evaluated and categorized according to criteria of significance established by the National Park Service and listed in the *Cultural Resources Management Guideline.*

National Register Nomination

All resources that appear to meet the criteria for the National Register of Historic Places will be nominated individually, as components of historic districts, or within multiple property nominations. Parks significant primarily for their cultural resources are automatically entered in the National Register upon establishment, but nomination forms will still be submitted to document the qualifying features of such parks.

National Historic Landmark Designation

Resources eligible for the National Register that appear to possess national significance may qualify for national historic landmark designation if they are unrelated to the primary purposes or themes of their parks (that is, if they lie within predominantly natural or recreational parks or within cultural parks focusing on other themes). National Register forms documenting the case for possible landmark designation will be submitted for such resources.

World Heritage Site Designation

Cultural properties believed to possess international significance may be nominated to the World Heritage List. Inclusion in the Indicative Inventory of Potential U.S. World Heritage Nominations will be a prerequisite for nomination. U.S. recommendations are approved by an interagency panel chaired by the Assistant Secretary for Fish and Wildlife and Parks, based on criteria promulgated by the World Heritage Committee. These criteria and the rules for U.S. participation in the Convention Concerning the World Cultural and Natural Heritage are published in 36 CFR 73.

(See World Heritage Sites 4:5)

RESEARCH

The National Park Service will conduct a coordinated program of basic and applied research to support planning for and management of park cultural resources. The principal goals of such mission-oriented research will be

to ensure a systematic and fully adequate park information base

to identify and evaluate cultural resources

to develop appropriate technologies and methods for monitoring, treating, and protecting cultural resources

to ensure accurate treatment and interpretation of cultural resources employing the best current scholarship

to develop ethnographically appropriate approaches to conserving park cultural and natural resources

Adequate research to support planning and legal compliance will precede any final decisions about the preservation or treatment of cultural resources or about park development or operational activities that might affect cultural resources. Research needs will be identified and justified in an approved park resource management plan.

Execution of research will be preceded by approved documentation of the work to be performed. The documentation will address the relationship of the research to management objectives; the theoretical orientation and methodology of the research; how data will be recorded, ensuring confidentiality when warranted; the dissemination of results; the preservation of physically affected resources, including data recovery; and the cataloging of collections.

All research, whether conducted by NPS personnel, contractors, cooperative researchers, or independent researchers, will conform to current standards of scholarship. It will be administered and conducted only by fully qualified personnel. The Park Service will support its research personnel in maintaining and improving their disciplinary knowledge and skills.

The data and knowledge acquired through research will be made widely available within and outside the National Park Service through such media as professional and technical reports, professional journals, popular publications, exhibits, and audiovisual productions. The status of current research and significant findings will be publicized through workshops, seminars, conferences, journal articles, and the news media. Certain research data may be withheld from public disclosure to protect sensitive archeological, historic, or ethnographic resources. The National Park Service will maintain a centralized cultural resource management bibliography of all research reports and planning documents addressing park cultural resources.

(See Information Base 2:5, Science and Research 4:2, Planning and Proposal Formulation 5:4, Library Materials 5:11, Ethnographic Research and Inventories 5:12, Consultation and Confidentiality 5:12, Confidentiality of Resource Data 5:13)

Cooperative and Independent Research

The National Park Service will promote cooperative relationships with recognized educational and scientific institutions and qualified individuals, encouraging them to direct their research toward park management objectives. Where appropriate, the Park Service will affiliate its cultural resource preservation and research facilities and activities with recognized institutions. The Service will encourage and, where appropriate, support independent research pertinent to the broader contexts within which park resources exist. NPS facilities and assistance will be made available to qualified scholars conducting NPS-authorized research as long as park operations will not be impeded or park resources impaired.

Research unrelated to NPS requirements will not be undertaken or funded by the National Park Service, but may be conducted by qualified independent investigators. The issuance of a permit for independent research involving physical intervention into the fabric of cultural resources or the collection of objects in parks will be subject to compelling evidence that the proposal is essential to significant research concerns and that the purpose of this research can be reasonably achieved only by using park resources.

All cooperative and independent research must conform to NPS policies and guidelines.

(See Conduct of Research 4:3, Research and Collection Activities 8:15)

Preservation of Data and Collections and Protection of Research Potential

The National Park Service will not take or allow any action that reduces the research potential of cultural resources without an appropriate level of research and documented data recovery. Because research involving physical intervention into cultural resources or removal of objects is a destructive process entailing an irretrievable commitment of the resources, research in parks will employ nondestructive methods to the maximum extent feasible.

Field data, objects, specimens, and features of structures retrieved for preservation during cultural resource research and treatment projects, together with associated records and reports, will be managed within the park museum collection. Where practical, the features of sites and structures will be left in place.

(See Museum Objects and Library Materials 5:9)

CONSULTATION

Other federal agencies, state and local governments, potentially affected native American and other communities, interest groups, and entities specified by law or regulation, including state historic preservation officers and the Advisory Council on Historic Preservation, will be given opportunities to become informed about and comment on anticipated NPS actions at the earliest practicable time. The National Park Service will also encourage the continuing informal exchange of views with concerned local communities on cultural resource matters.

PLANNING AND PROPOSAL FORMULATION

Overall direction for the identification, evaluation, protection, treatment, and use of cultural resources will be provided in the basic planning document(s) for each park.

Each park with cultural resources will prepare and periodically update a cultural resource component of the park's resource management plan, defining and programming the activities required to perpetuate and provide for the public enjoyment of those resources.

Any action that might affect cultural resources will be undertaken only if it meets all the following criteria:

> The action is consistent with the park's purposes and applicable NPS policies and guidelines.
>
> Cultural resource specialists have participated in planning, and sufficient data have been gathered to assess the probable effects.
>
> Relevant sections of the National Historic Preservation Act have been complied with in accordance with the regulations of the Advisory Council on Historic Preservation (36 CFR 800) and the "Guidelines for Federal Responsibilities under Section 110 of the National Historic Preservation Act" (FR 53:4728).
>
> In cases involving ethnographic resources, associated native American and other ethnic groups have been consulted, and their concerns have been taken into account.

Any action that will affect cultural resources adversely will be undertaken only if the following additional criteria are also met:

> There is no reasonable alternative.
>
> All reasonable measures to limit adverse effects will be taken, including recovery of data and salvage of materials, as appropriate.

(See Implementation Plans 2:9, Treatment of Cultural Resources 5:5, Ethnographic Resources 5:11)

TREATMENT OF CULTURAL RESOURCES

With some differences by type, cultural resources are subject to several basic treatments, including preservation as is, restoration to earlier appearances by the removal of later accretions and replacement of missing elements, and reconstruction or reproduction to replicate absent original resources. The fundamental question of which treatments will best provide for the preservation and public enjoyment of particular cultural resources will be decided through planning. No treatment project will be undertaken unless supported by an approved proposal, plan, or report appropriate to the proposed action. The significance of the resource, its condition, its interpretive value, its research potential, and the availability of data will all be weighed in determining the appropriate treatment. The appearance and condition of the resource before treatment and changes made during treatment will be appropriately documented. Pending planning decisions, all cultural resources will be protected and preserved in their existing conditions.

As a basic principle, anything of historical appearance that the National Park Service presents to the public in a park will be either an authentic survival from the past or an accurate representation of that which formerly existed there. Reconstructions and reproductions will be clearly identified as such.

Achievement of other park purposes may sometimes conflict with and outweigh the value of cultural resource preservation. The planning process will be the vehicle for weighing conflicting objectives and deciding that a cultural resource should not be preserved. Following such a decision, significant resource data and materials will be retrieved. The resource will then be permitted to deteriorate naturally, unless its destruction or direct removal is necessary for public safety or to eliminate an unacceptable intrusion. This policy does not apply to museum objects.

Policies applicable to specific cultural resource classes follow.

(See Planning Process and Products 2:4, Planning and Proposal Formulation 5:4, Cultural Resources 6:7)

ARCHEOLOGICAL RESOURCES

Treatment

Archeological resources will be left undisturbed unless removal of artifacts or intervention into fabric is justified by protection, research, interpretive, or development requirements. They will be preserved in a stable condition to prevent degradation and loss of research values or in-situ exhibit potential. Structures of archeological significance and recovered archeological objects are also subject to the treatment policies for structures and museum objects.

(See Museum Objects and Library Materials 5:9)

Archeological Data Recovery

Significant archeological data that would be lost as a result of resource treatment projects, park development, uncontrollable degradation or destruction from natural or human causes, or other activities will be recovered in accordance with appropriate research proposals.

CULTURAL LANDSCAPES

Treatment

Preservation. A cultural landscape will be preserved in its present condition if (1) that condition allows for satisfactory protection, maintenance, use, and interpretation, or (2) another treatment is warranted but cannot be accomplished until some future time.

Rehabilitation. A cultural landscape may be rehabilitated for contemporary use if (1) it cannot adequately serve an appropriate use in its present condition, and (2) rehabilitation will retain its essential features and will not alter its integrity and character or conflict with park management objectives.

Restoration. A cultural landscape may be restored to an earlier appearance if (1) restoration is essential to public understanding of the cultural associations of a park, and (2) sufficient data exist to permit restoration with minimal conjecture.

Reconstruction. An obliterated cultural landscape may be reconstructed if (1) reconstruction is essential to public understanding of the cultural associations of a park established for that purpose, and (2) sufficient data exist to permit reconstruction with minimal conjecture.

General Management

The management of cultural landscapes will recognize and protect significant historic, archeological, ethnographic, and design values. Treatment decisions will take into account both the natural and built features of the landscape and the dynamics inherent in natural processes and continued human and animal occupation. The perpetuation of significant vistas and historic parkway and park road landscape design features will receive special emphasis.

Every effort will be made to ensure that routine park operations do not intrude unnecessarily on a cultural landscape by introducing visible, audible, or atmospheric elements out of character with the historic environment. Trash disposal, storage of materials, parking of vehicles, and other operational activities will be conducted out of public view to the maximum extent feasible.

Cultural landscapes, like other cultural resources, will not be "beautified" to suit modern aesthetic tastes through decorative plantings or other modifications not reflecting historic conditions.

(See Revegetation and Landscaping 9:4)

STRUCTURES

Treatment

Preservation. A structure will be preserved in its present condition if (1) that condition allows for satisfactory protection, maintenance, use, and interpretation, or (2) another treatment is warranted but cannot be accomplished until some future time.

Rehabilitation. A structure may be rehabilitated for contemporary functional use if (1) it cannot adequately serve an appropriate use in its present condition, and (2) rehabilitation will not alter its integrity and character or conflict with park management objectives. Rehabilitation does not apply to prehistoric structures.

Restoration. A structure may be restored to an earlier appearance if (1) restoration is essential to public understanding of the cultural associations of a park, and (2) sufficient data exist to permit restoration with minimal conjecture.

Reconstruction. A vanished structure may be reconstructed if (1) reconstruction is essential to public understanding of the cultural associations of a park established for that purpose, (2) sufficient data exist to permit reconstruction on the original site with minimal conjecture, and (3) significant archeological resources will be preserved in situ or their research values will be realized through data recovery. A vanished structure will not be reconstructed to appear damaged or ruined. Generalized representations of typical structures will not be attempted.

(See Physical Access for Disabled Persons 5:14, Ruins 5:8, Environmental Monitoring and Control 5:14)

Movement of Historic Structures

Proposals for moving historic structures to or within parks will consider the effects of movement on the structures, their present environments, their proposed environments, and the archeological research value of the structures and their sites. No historic structure will be moved if its preservation would be adversely affected or until the appropriate recovery of significant archeological data has occurred. Prehistoric structures will not be moved.

A historic structure may be acquired for relocation to a park only if (1) a comparable structure existed there historically, and (2) the acquired structure is essential to public understanding of the park's cultural associations. No structure will be acquired to substitute for a missing structure of national significance. In general, the acquisition of historic structures for parks will be governed by the policies for reconstruction of historic structures, including provisions for data recovery.

A nationally significant structure may be moved only if (1) it cannot practically be preserved on its present site, or (2) the move constitutes a return to a previous historic location, and the previous move and present location are unimportant to the structure's significance. A structure of less-than-national significance may be moved if (1) it cannot practically be preserved on its present site, or (2) its present location is unimportant to its significance, and its relocation is essential to public understanding of the park's cultural associations.

In moving a historic structure, every effort will be made to reestablish its historic orientation, immediate setting, and general relationship to its environment. If several structures are moved, they may be arranged in an ensemble appropriate to their character, if they are comparable to structures formerly present there and if their assembly is essential to public understanding of the park's cultural associations. The artificial nature of the ensemble will be clearly identified.

New Construction

In preference to new construction, every reasonable consideration will be given to using historic structures for park purposes compatible with their preservation and public appreciation. Additions may be made to historic structures when essential to their continued use. Structural additions will harmonize with but be readily distinguishable from the older work and will not intrude upon the historic scene; other additions, such as lightning protection, security equipment, heating, and air conditioning, will meet the requirements for rehabilitation.

New structures, landscape features, and utilities will be constructed in cultural zones only if (1) existing structures and improvements do not meet essential management needs, and (2) new construction is designed and sited to preserve the integrity and character of the area. Unless associated with an approved restoration or reconstruction, new construction will harmonize with historic features in scale, texture, and continuity but will not imitate them.

(See Management Zoning 2:6, Rehabilitation 5:7, Adaptive Use 9:2)

Use of Historic Structures

Because unused structures are susceptible to neglect and vandalism accelerating their deterioration, compatible uses for historic structures will be found where appropriate.

All uses of historic structures are subject to preservation and public safety requirements. No administrative or public use will be permitted that would threaten the stability or character of a structure, the museum objects within it, or the safety of its users or that would entail alterations significantly compromising its integrity.

(See Planning and Proposal Formulation 5:4, Fire Detection and Suppression 5:13, Physical Access for Disabled Persons 5:14, Adaptive Use 9:2, Energy Management 9:7, Use of Historic Structures 9:16)

Structures Owned or Managed by Others

Historic structures and related historic property owned but not occupied by the National Park Service, or structures and property owned by others in which the National Park Service has a less-than-fee interest or major management or preservation role, will be studied, inventoried, protected, treated, maintained, and used in accordance with NPS policies, guidelines, and standards to the extent permitted by the Service's interest. Whenever feasible and appropriate, interests acquired or retained by the National Park Service will enable application of this policy.

(See Land Protection Plans 3:1, Historic Property Leases 5:15, Leasing of Historic Structures 10:4)

Damaged or Destroyed Structures

Prehistoric and historic structures damaged or destroyed by fire, storm, earthquake, war, or other accident may be preserved as ruins or may be rehabilitated, restored, or reconstructed in accordance with these policies.

(See Shoreline Management 4:20)

Ruins

The stabilization of ruins will be preceded by studies to recover any data that would be affected by stabilization work. Ruins and related features on unexcavated archeological sites will be stabilized only to the extent necessary to preserve research values or to arrest structural deterioration. Archeological ruins to be exhibited will not be excavated until adequate provisions are made for data recovery and stabilization.

Structures will not be deliberately reduced to ruins, nor will missing structures be reconstructed to simulate ruins.

Earthworks

Appropriate vegetation will be maintained when necessary to prevent erosion of prehistoric and historic earthworks, even when the historic condition might have been bare earth. Because earthwork restorations and reconstructions can obliterate surviving remains and are often difficult to maintain, other means of representing and interpreting the original earthworks will receive first consideration.

(See Landscapes and Plants 4:8, Exotic Plants and Animals 4:11)

Outdoor Sculpture

Outdoor statues, monuments, memorials, and plaques will be managed with the same consideration as other historic structures. Because their surface textures and finishes are important to their character and integrity, special care will be exercised in protecting, maintaining, and treating them.

(See Commemorative Works and Plaques 9:17)

Ships

To remain watertight and weather resistant, historic ships may require more extensive and frequent replacement of historic fabric than other structures. Their historic character will nevertheless be retained through the use of appropriate materials and fabrication methods.

MUSEUM OBJECTS AND LIBRARY MATERIALS

The National Park Service will collect, protect, preserve, and use objects, documents, and specimens in the disciplines of archeology, ethnography, history (includes archives), biology, geology, and paleontology to aid understanding among park visitors and to advance knowledge in the humanities and sciences.

Treatment of Museum Objects

Preservation. A museum object will be preserved in its present condition through ongoing preventive conservation if (1) that condition is satisfactory for exhibit or research, or (2) another treatment is warranted but cannot be accomplished until some future time. Interventional measures will be taken when preventive conservation measures are insufficient to reduce deterioration to a tolerable level, or when the object is so fragile as to be endangered under any circumstances. Intervention will be minimized to reduce the possibility of compromising the object's integrity.

Restoration. A museum object may be restored to an earlier appearance if (1) restoration is required for exhibit or research purposes, (2) sufficient data exist to permit restoration with minimal conjecture, and (3) restoration will not modify the object's known original character. Restoration will be accomplished using the techniques and materials that least modify the object and in such manner that the materials will be removable at a later time with minimal adverse effect. Restored areas will be distinguishable from original material and documented. Restoration will take into account the possible importance of preserving signs of wear, damage, former maintenance, and other historical and scientific evidence.

Reproduction. Museum objects needed for interpretive presentations will be reproduced for such use when the originals are unavailable or would be subject to undue deterioration or loss. The National Park Service will observe copyright laws with respect to reproduction.

Acquisition, Management, and Disposition of Museum Objects

Objects and related documentation essential to achieving the purposes and objectives of the parks will be acquired and maintained in accordance with approved scope of collection statements for each park. Archeological objects systematically collected within a park and natural history specimens systematically collected within a park for exhibit or permanent retention will be managed as part of the museum collection. Museum collection management and care will be addressed at all appropriate levels of planning.

Museum objects will be acquired and disposed of in conformance with legal authorizations and current NPS curatorial procedures. The National Park Service will acquire only collections having legal and ethical pedigrees, and each park will maintain complete and current accession records to establish the basis for legal custody of the objects in its possession. Museum catalog records will be prepared by each park to record basic property management data and other documentary information for museum objects. Objects will be inventoried in accordance with current procedures.

The National Park Service may cooperate with qualified institutions in the management of museum objects and, under existing legal authorities, may loan objects to and exchange objects with such institutions for approved purposes. The National Park Service will repatriate museum objects when lawful and when it can be demonstrated by a native American group that the materials are its inalienable communal property.

Interested persons will be permitted to inspect and study NPS museum objects and records in accordance with standards for the preservation and use of collections and subject to the policies regarding confidentiality of resource data.

(See Natural Resource Collections 4:4, Inventories 5:1, Preservation of Data and Collections... 5:3, Consultation and Confidentiality 5:12, Confidentiality of Resource Data 5:13, Fire Detection and Suppression 5:13, Environmental Monitoring and Control 5:14, Nonpersonal Services and Media 7:3, Interpretation and Native Americans 7:5, Curatorial Facilities 9:15)

Historic Furnishings

When the historic furnishings of a structure are present in their original arrangement, they will not be moved or replaced unless required for their protection or preservation, or unless the structure is designated for another use in an approved planning document. A structure may be refurnished in whole or in part if (1) its history is significantly related to a primary park theme, (2) refurnishing is the best way to interpret that history to the public, and (3) sufficient evidence of furniture design and placement exists to refurnish with minimal conjecture. Reproductions will be used only when prototypes exist to ensure the accurate re-creation of historic pieces.

(See Planning Process and Products 2:4, Planning and Proposal Formulation 5:4, Nonpersonal Services and Media 7:3)

Archives and Manuscripts

Archival and manuscript collections are considered museum property and will be managed in ways that preserve them intact for the future while providing current access.

When an archival collection not owned by the National Park Service falls within a park's approved scope of collection statement, every reasonable effort will be made to acquire it if (1) an appropriate storage facility will be provided by the Park Service or a cooperating institution, (2) the facility will be staffed by at least one archivist, curator, librarian, or other person experienced in caring for documentary materials, and (3) the collection will be made available to serious researchers under conditions that maximize both preservation and use and ensure security against theft and vandalism.

If the foregoing acquisition criteria cannot be met, the National Park Service will encourage transfer or donation of the collection to an appropriate local or regional repository or, in the case of a collection important to a park's administrative history, to the National Park Service History Collection at the Harpers Ferry Center.

Placement of historical documents owned by the National Park Service into repositories managed by others will be subject to the procedures concerning loans of museum property and any conditions of access or other restrictions to which the Park Service may have agreed or is bound by law.

Parks will retain notes or copies of records significant to their administrative histories when they periodically ship their official records to federal record centers.

(See Acquisition, Management, and Disposition of Museum Objects 5:10)

Library Materials

Parks and other NPS offices may establish libraries to organize, store, and make available books and other information sources serving their reference and research needs. Library collections will be properly housed and maintained, and adequate space for users will be provided. All books and other recorded informational materials acquired for reference purposes will be organized and accounted for by a standard library cataloging and classification system, whether or not they remain physically in the library. Surplus library materials will be disposed of according to current guidelines.

Books and other library materials used in exhibits or as historic furnishings will be managed as museum objects. In addition, they may be separately cataloged and classified to facilitate access to their informational content.

(See Research 5:2, Acquisition, Management, and Disposition of Museum Objects 5:10)

ETHNOGRAPHIC RESOURCES

Certain contemporary native American and other communities are permitted by law, regulation, or policy to pursue customary religious, subsistence, and other cultural uses of park resources with which they are traditionally associated. Such continuing use is often essential to the survival of family, community, or regional cultural systems, including patterns of belief and economic and religious life. Recognizing that its resource protection mandate affects this human use and cultural context of park resources, the National Park Service will plan and execute programs in ways that safeguard cultural and natural resources while reflecting informed concern for the contemporary peoples and cultures traditionally associated with them.

(See Native American Use 8:8, Subsistence 8:16)

Ethnographic Research and Inventories

To ensure that NPS plans and actions reflect contemporary knowledge about the cultural context of sites, structures, certain natural areas, and other ethnographic resources, the National Park Service will conduct appropriate cultural anthropological research in cooperation with park-associated groups. The purposes of this research will be to meet management needs for information about such groups; to develop inventories of traditional ethnographic resources associated with them; to determine the effects of their traditional ceremonial and consumptive uses of park resources; to evaluate the factors guiding their traditional systems for managing natural resources and creating cultural properties; to define their traditional and contemporary relationships to these resources; and to assess the effects of NPS activities on these groups. Research findings will be used to support planning, resource management decisions, and activities; to develop interpretive programs accurately reflecting native Amer[illegible]nd other cultures; and to facilitate consultation with and meet management responsibi[illegible] park-associated communities.

(See Park Planning Process and Products 2:4, Park Planning in a Regional Context 2:9, Inventories 5:1, Research 5:2, Interpretation and Native Americans 7:5, Native American Use 8:8)

Consultation and Confidentiality

The fundamental relationships that often exist between park resources and the integrity of contemporary native American and other cultures necessitate that the National Park Service consult with affected communities before reaching decisions about the treatment of traditionally associated resources. The identities of community consultants and information about sacred and other culturally sensitive places and practices will be kept confidential when research agreements or other circumstances warrant. The research use of community consultants or respondents will be subject to their informed consent.

(See Research 5:2, Confidentiality of Research Data 5:13)

SUBMERGED CULTURAL RESOURCES

The National Park Service will identify, evaluate, register, monitor, and protect the submerged cultural resources in its custody. Each park with submerged cultural resources will develop a program to protect them and to provide for their interpretation to the public.

Submerged cultural resources will be left in place unless removal of artifacts or intervention into fabric is compellingly justified by overriding protection, research, or interpretive requirements. No submerged cultural resource will be removed if its preservation would be adversely affected or unless provision has been made for its appropriate conservation and curation. All such resources collected from park waters will be managed within NPS museum collections. The National Park Service will not permit treasure hunting or salvage activities at or around shipwrecks or other submerged resources.

Programs will be conducted to enhance public understanding of submerged cultural resources. Parks may provide recreational diving access to submerged resources not susceptible to damage or the removal of artifacts from such access.

The National Park Service will take care to ensure that activities by other agencies in coastal areas or along major rivers do not inadvertently impact submerged park cultural resources.

The National Park Service will honor the sovereignty of other nations over wrecks of their commissioned vessels and will work with their governments through the U.S. Department of State in dealing with such shipwrecks.

(See Chapter 7: Interpretation and Education; see also Museum Objects and Library Materials 5:9, Recreational Activities 8:2)

BURIAL SITES AND CEMETERIES

Historic and prehistoric burial areas, whether or not formally plotted and enclosed as cemeteries, will be identified and protected. They will not be disturbed or archeologically investigated unless threatened with destruction by park development, operational activities, or natural forces.

The National Park Service will consult with native Americans and other individuals and groups linked by ties of kinship or culture to ethnically identifiable human remains when such remains may be disturbed or are encountered on park lands. Their preference for the treatment or disposition of such remains will be followed insofar as feasible. Decisions will be based on full consideration of alternatives, including project redesign to avoid disturbance, removal and reburial of remains with or without recordation or study, and removal of remains for study and retention in a museum collection. Reinterment at the same park may be permitted.

(See Interpretation and Native Americans 7:5, Cemeteries and Burials 8:16)

SECURITY AND PROTECTIVE MEASURES

The National Park Service will employ the most effective concepts, techniques, and equipment to protect cultural resources against theft, fire, vandalism, environmental impacts, and other threats without compromising their integrity or unduly limiting their appreciation by the public.

Confidentiality of Resource Data

Information regarding the location, nature, and cultural context of archeological, historic, and ethnographic resources may be exempted from public disclosure. Documentation is required for decisions to disseminate such information or to withhold it if it has been determined that dissemination will have substantial adverse effects on the resources.

(See Research 5:2, Acquisition, Management, and Disposition of Museum Objects 5:10, Consultation and Confidentiality 5:12)

Fire Detection and Suppression

Measures to protect cultural resources from fire will be developed as part of a park's fire management planning process, and prudent action will be taken to prevent harm to cultural resources by either fire or fire-suppression activities.

In the preservation of historic structures, every attempt will be made to comply with servicewide standard building and fire codes. When these cannot be met without significantly impairing a structure's integrity and character, the management and use of the structure, rather than the structure itself, will be modified to minimize the potential hazards.

When warranted by the significance of a historic structure or of the museum objects in a nonhistoric structure, adequate fire detection, warning, and suppression systems will be installed. Fire-fighting personnel will be advised of any peculiarities or dangers inherent in a structure and any objects to be given priority for protection or rescue. Park personnel will receive training in fire prevention and suppression with hand-held extinguishers at historic structures and museums, and designated personnel will be trained to respond to all emergencies involving museum collections.

Smoking will not be permitted in spaces housing museum collections or in historic structures other than those adapted for modern residential and administrative uses.

(See Structural Fire Protection and Suppression 9:7)

Environmental Monitoring and Control

When necessary for the preservation of a historic structure or a museum collection, appropriate measures will be taken to control relative humidity, temperature, light, and air quality. When museum objects are housed in a historic structure, an evaluation of the needs of both the collection and the structure will be made before introducing environmental control measures. All areas housing museum objects will be continuously monitored to determine whether appropriate levels of relative humidity, temperature, and light are being maintained.

(See Air Quality 4:17)

Pest Management

The National Park Service will follow the integrated pest management approach in addressing pest problems related to cultural resources. All feasible nonchemical methods will be exhausted before resorting to the use of chemicals. Any use of pesticides for cultural resources will conform to the NPS pesticide use policy.

(See Pests 4:13)

Emergency Management

The emergency operations plan for each park with cultural resources will address their protection or rescue in the event of an emergency or disaster.

(See Emergency Preparedness and Emergency Operations 8:6)

PHYSICAL ACCESS FOR DISABLED PERSONS

The National Park Service will provide the highest feasible level of physical access for disabled persons to historic properties, consistent with the preservation of the properties' significant historical attributes. Access modifications for disabled persons will be designed and installed to least affect the features of a property that contribute to its significance. Some impairment of some features will be accepted in providing access. If it is determined that modification of particular features would destroy a property's significance, however, such modifications will not be made.

(See Interpretation for Special Populations 7:4, Accessibility for Disabled Persons 8:5, Accessibility for Disabled Persons 9:3, Accessibility for Disabled Persons 10:6)

HISTORIC PROPERTY LEASES

In accordance with section 111 of the National Historic Preservation Act and its implementing regulations (36 CFR 18), the National Park Service may lease a park historic property listed in or eligible for the National Register of Historic Places if the lease will ensure its preservation. The Park Service will offer a property for lease if the proposed use will meet this requirement and will not unduly limit public appreciation of the property, interfere with visitor use and enjoyment of the park, or preclude use of the property for park administration, employee housing, or other management purposes judged more appropriate or cost-effective.

Each lease will be competitively offered. The government will receive at least fair market rental value based on an appraisal of the property, adjusted for investments required of the lessee. The term of the lease will be the shortest time needed for the proposed use, taking into account required lessee investments, common practice for the type of lease, possible future alternatives for the property, and other relevant factors. No lease will exceed 99 years. If a lease requires or allows the lessee to maintain, repair, rehabilitate, restore, or build upon the property, it will require the work to be done in accordance with applicable NPS policies, guidelines, and standards. Leasing of historic structures to provide visitor facilities and services is also subject to all applicable laws, policies, and guidelines related to concession operations.

(See Leasing of Historic Structures 10:4)

ROLES OF VOLUNTEERS AND PARAPROFESSIONALS

Volunteers and paraprofessionals assisting with cultural resource studies and treatments will be directly supervised by qualified cultural resource professionals of the appropriate disciplines, and their work will conform to applicable NPS policies, guidelines, and standards. They will receive documented training in the technical aspects of their work.

(See Volunteers in Parks 7:4)

6 Wilderness Preservation and Management

The National Park Service will manage wilderness areas for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness. Management will include the protection of these areas, the preservation of their wilderness character, and the gathering and dissemination of information regarding their use and enjoyment as wilderness. Public purposes of wilderness will include recreation, scenic preservation, scientific study, education, conservation, and historical use.

The NPS wilderness management policies are based on statutory provisions of the 1916 NPS organic act (16 USC 1 et seq.), the 1964 Wilderness Act (16 USC 1131 et seq.), and legislation establishing individual units of the national park system.

Although these policies are intended to establish consistent servicewide direction for the preservation, management, and use of wilderness, certain policies may be superseded by statutory provisions that apply to individual wilderness areas, by rights reserved by former landowners, and in Alaska, by applicable provisions of the Alaska National Interest Lands Conservation Act (ANILCA, 16 USC 3101 et seq.).

The following characteristics are used in the Wilderness Act to define and describe a wilderness area. Wilderness is an area

> where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain
>
> of undeveloped federal land retaining its primeval character and influence, without permanent improvements or human habitation
>
> which generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable
>
> which is protected and managed so as to preserve its natural conditions
>
> which has outstanding opportunities for solitude or a primitive and unconfined type of recreation
>
> which has at least five thousand acres of land or is of sufficient size to make practicable its preservation and use in an unimpaired condition
>
> which may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value

These attributes serve both as standards for studying areas and evaluating their suitability for inclusion in the national wilderness preservation system and as objectives to guide NPS actions pertaining to the preservation and use of wilderness areas.

WILDERNESS REVIEWS

The National Park Service will continue to review areas that qualify for wilderness study, consistent with provisions of the Wilderness Act and subsequent legislation directing that wilderness studies be made.

Wilderness studies will be supported by appropriate documentation of compliance with the National Environmental Policy Act (42 USC 4371 et seq.) and the National Historic Preservation Act (16 USC 470 et seq.).

(See Park Planning Process and Products 2:4)

Criteria for Recommended Wilderness

Lands and waters found to possess the characteristics and values of wilderness, as defined in the Wilderness Act, will be studied for recommendation to Congress for wilderness designation.

Lands that have been logged, farmed, grazed, or otherwise utilized in ways not involving extensive development or alteration of the landscape will be considered for wilderness if at the time of study the effects of these activities are substantially unnoticeable or their wilderness character could be restored through appropriate management actions.

An area will not be excluded from a wilderness recommendation solely because established or proposed management practices require the use of tools, equipment, or structures if those practices are necessary for the health and safety of wilderness travelers or protection of the wilderness area.

Lands will not be excluded from a wilderness recommendation solely because of prior rights or privileges, such as grazing and stock driveways, provided these operations do not involve the routine use of motorized or mechanical equipment and do not involve development and structures to such an extent that the human imprint is substantially noticeable.

Lands subject to mineral exploration and development should be recommended for wilderness only if it is likely that mineral rights will be relinquished, acquired, exchanged, or otherwise eliminated in the foreseeable future.

Lands containing aboveground utility lines will not be recommended for wilderness. Areas containing underground utility lines may be included if the area otherwise qualifies as wilderness and the maintenance of the utility line does not require the routine use of mechanized and motorized equipment. No new utility lines may be installed in wilderness, and existing utility lines may not be extended or enlarged.

Historic features that are primary attractions for park visitors will not be recommended for wilderness. However, an area that attracts visitors primarily for the enjoyment of solitude and unconfined recreation in a primitive setting may also contain historic features and still be included in wilderness. Typical historic features that may be included are archeological sites, historic trails, travel routes, battle sites, and minor structures. Historic trails may serve and be maintained as part of the wilderness trail system. However, if the planned scope and standard of maintenance would

> The project will not adversely affect physical or biological resources, ecosystem processes, or aesthetic values over an area or duration greater than necessary to meet research objectives.
>
> The project will not interfere with recreational, scenic, or conservation purposes of the wilderness over a broad area or long duration.

Hydrologic, hydrometeorologic, seismographic, and other research and monitoring devices may be installed and operated in wilderness only upon a finding that (1) the desired information is essential and cannot be obtained from a location outside of wilderness, and (2) the proposed device is the minimum tool necessary to accomplish the objective safely and successfully. Devices located in wilderness will be removed when determined to be no longer essential. All research activities and the installation, servicing, and monitoring of research devices will be accomplished in compliance with NPS wilderness management policies and procedures contained in the park's wilderness management plan. Non-NPS research activities that might disturb resources or visitors or require the waiver of any regulation may be allowed only pursuant to the terms and conditions of a permit.

(See Science and Research 4:2, Inventory and Monitoring 4:4, Weather and Climate 4:19, Research 5:2, Ethnographic Research and Inventories 5:12, Research and Collection Activities 8:15)

Fire Management

[Note: Fire management policies are under review by the Interagency Fire Management Policy Review Team and will be modified as necessary pursuant to their recommendations.]

Fire management activities conducted in wilderness areas will conform to the basic purposes of wilderness. The park's fire management and wilderness management plans together will identify the natural and historic roles of fire in the wilderness and will provide a prescription for response, if any, to natural and human-caused wildfires. If a prescribed fire program is implemented, these plans will also include the prescriptions and procedures under which the program will be conducted.

Actions taken to suppress wildfires will use the minimum tool concept and will be conducted in such a way as to protect natural and cultural features and to minimize the lasting impacts of the suppression actions and the fires themselves. Information on developing a fire management program is contained in the *Fire Management Guideline* (NPS-18).

(See Fire Management 4:14, Fire Detection and Suppression 5:13)

Cultural Resources

Cultural features such as archeological sites, historic trails or routes, or structures that have been included within wilderness will be protected and maintained using methods that are consistent with the preservation of wilderness character and values and cultural resource protection requirements. Burial plots or commemorative features, such as plaques or memorials, that have been included in wilderness may be retained, but no new additions may be made unless authorized by federal statute, existing reservations, or retained rights. Native American religious areas and other ethnographic resources will be inventoried and protected. Native Americans will be permitted nonmotorized access within wilderness for sacred or religious purposes in accordance with criteria for special park uses.

(See Planning and Proposal Formulation 5:4, Treatment of Cultural Resources 5:5, Ethnographic Resources 5:11, Native American Use 8:8, Special Park Uses 8:10, Cemeteries and Burials 8:16, Commemorative Works and Plaques 9:17)

USE OF WILDERNESS

The National Park Service will encourage and facilitate those uses of wilderness that require the wilderness environment and do not degrade wilderness resources and character. NPS wilderness management actions will be directed toward providing opportunities for primitive and unconfined types of recreation by park visitors. Appropriate restrictions may be imposed on any authorized activity in the interest of preserving wilderness character and resources or to ensure public safety. Visitors will be encouraged and in some situations may be required through the regulatory process to comply with the concept of no-trace or minimum-impact wilderness use for both themselves and their livestock.

(See Management of Recreational Use 8:2)

General Public Use

Park visitors must accept wilderness largely on its own terms, without modern facilities provided for their comfort or convenience. Users must also accept certain risks, including possible dangers arising from wildlife, weather conditions, physical features, and other natural phenomena, that are inherent in the various elements and conditions that comprise a wilderness experience and primitive methods of travel. The National Park Service will not eliminate or unreasonably control risks that are normally associated with wilderness, but it will strive to provide users with general information concerning possible risks, recommended precautions, minimum-impact use ethics, and applicable restrictions and regulations.

Wilderness users will be required to carry out all refuse as defined in 36 CFR 1.4.

As a general rule, public use of motorized equipment or any form of mechanical transport will be prohibited in wilderness. Operating a motor vehicle or possessing a bicycle in designated wilderness outside Alaska is prohibited by NPS regulations in 36 CFR 4. However, the Wilderness Act authorizes continuation of motorboat and aircraft use under certain circumstances where those activities were established prior to wilderness designation. The National Park Service will limit authorizations for the continued use of any motorized equipment in wilderness to situations where such use has been specifically authorized by Congress and determined by Congress or the Park Service to be compatible with the purpose, character, and resource values of the particular wilderness area involved. The use of motorized equipment by the public in wilderness areas in Alaska is governed by applicable provisions of ANILCA and NPS regulations in 36 CFR 13. The specific conditions under which motorized equipment may be used by the public will be outlined in each park's wilderness management plan.

The use of hand-propelled watercraft may be allowed in wilderness. However, the watercraft and all other supplies and equipment must be removed at the end of each wilderness trip.

Mobility-impaired persons may use wheelchairs (as defined in 36 CFR 1.4) in wilderness.

(See Accessibility for Disabled Persons 8:5, Accessibility for Disabled Persons 9:3)

Commercial Services

Wilderness-oriented commercial services that contribute to achieving public enjoyment of wilderness values or that provide opportunities for primitive and unconfined types of recreation may be authorized if they meet the "necessary and appropriate" tests of the Concessions Policy and Wilderness acts and if they are consistent with the wilderness management objectives contained in

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or handicap. Volunteers will not displace NPS employees. The *Volunteers in Parks Guideline* (NPS-7) provides additional guidance for the volunteers program.

(See Roles of Volunteers and Paraprofessionals 5:15)

Cooperating Associations

Cooperating associations will be used wherever possible to facilitate the conservation, education, and interpretive programs of a park, as authorized under 16 USC 17j-2(e). Based on a written cooperative agreement with the National Park Service, cooperating associations may produce and sell interpretive items such as publications, maps, visual aids, handcrafts, and other objects that are directly related to the understanding and interpretation of the park or the national park system. Associations may offer some interpretive services to augment those of the National Park Service. Guidelines for administering cooperating association programs are included in the *Cooperating Associations Policies, Standards, and Guidelines* (NPS-32).

(See Cooperating Associations 10:4)

SPECIAL PROGRAM INTEGRATION

The integration of special programs and servicewide initiatives into NPS interpretive programs must be carefully planned with appropriate levels of staffing, funding, and guidance. Superintendents are encouraged to integrate these special programs and initiatives into park operations as appropriate to the themes and objectives of the park's interpretive program. Cooperative ventures in interpretation between the National Park Service and other federal agencies, states, native American authorities, and international groups or other countries are encouraged when they benefit all partners in the program.

*

INTERPRETATION AND NATIVE AMERICANS

The National Park Service will actively consult with appropriate native American tribes or groups in the planning, development, and operation of park interpretive programs that relate to the culture and history of a particular tribe or group. Interpretive programs will reflect the best present, accepted ethnographic understanding of native American cultural systems. Cooperative programs will be developed with various tribes and groups to help the Park Service interpret their cultural heritage and to present native American perspectives of their own lifeways and resources, both cultural and natural. Ethnographic or cultural anthropological data and concepts will also be used in interpretive programs as appropriate. The National Park Service will seek to present factual, balanced, and to the extent achievable, value-neutral presentations of both native and nonnative American cultures, heritage, and history.

The National Park Service will not exhibit native American disinterred skeletal or mummified human remains or photographs or replicas of them. There will be no display of grave goods or other objects if native Americans who are culturally associated with them object to such exhibit. Associated native American tribes and groups will be consulted to determine the religious status of any object, the sacred nature of which is suspected but not confirmed, before it is exhibited or before any action is taken.

(See Acquisition, Management, and Disposition of Museum Objects 5:10, Ethnographic Resources 5:11)

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one location may be inappropriate if conducted in another. The National Park Service will consider the park's purposes and the effects on park resources and visitors when determining the appropriateness of a specific recreational activity in a specific park. Unless the activity is mandated by statute, the Park Service will not allow a recreational activity in a park or in certain locations within a park if it would involve or result in

inconsistency with the park's enabling legislation or proclamation, or derogation of the values or purposes for which the park was established

unacceptable impacts on visitor enjoyment due to interference or conflict with other visitor use activities

consumptive use of park resources (does not apply to certain traditional activities specifically authorized by NPS general regulations)

unacceptable impacts on park resources or natural processes

unacceptable levels of danger to the welfare or safety of the public, including participants

Recreational activities that are proposed as organized events or that involve commercialization, advertising, or publicity by participants or organizers are special events and are managed in accordance with the criteria and procedures described in the *Special Park Uses Guideline* (NPS-53).

(See Park Planning Process and Products 2:4, Management Techniques 6:4, Commercial Services 8:3, River Use 8:3, Backcountry Use 8:3, Fishing 8:4, Hunting and Trapping 8:4, Off-road Vehicle Use 8:4, Snowmobiles 8:5, Visitor Safety 8:5, Native American Use 8:8, Special Park Uses 8:10, Collecting Natural Products 8:15)

Commercial Services. The National Park Service may permit commercial services that are not in derogation of park purposes or values and that provide recreational opportunities for visitors, contribute to visitor enjoyment of park resources, and support or achieve applicable management objectives. Commercial services will be operated only under concession or commercial use authorizations and are subject to concession laws, policies, and guidelines.

(See Chapter 10: Concessions Management; see also Commercial Services 6:8)

River Use. A river management plan will be developed for each park having significant levels of river use, or the potential for such use. Public use will be managed to prevent unacceptable impacts on aquatic or riverine resources or adverse effects on visitor enjoyment. Each river management plan will include specific procedures for disposing of refuse and human waste.

(See Implementation Plans 2:9, Water Quantity and Quality 4:15, Floodplains and Wetlands 4:16, Grazing 8:14)

Backcountry Use. The National Park Service uses the term "backcountry" to refer to primitive, undeveloped portions of parks. This is not a specific management zone, but refers to a general condition of land that may occur in any appropriate zone or subzone. Backcountry use will be managed to avoid unacceptable impacts on park resources or adverse effects on visitor enjoyment of appropriate recreational experiences. The National Park Service will identify acceptable limits of impacts, monitor backcountry use levels and resource conditions, and take prompt corrective action when unacceptable impacts occur. Management strategies designed to guide the preservation, management, and use of the backcountry and to achieve the park's management objectives will be integrated into the park's backcountry management plan.

The number and types of facilities to support visitor use, including sanitary facilities, will be limited to the minimum necessary to achieve a park's backcountry management objectives and to provide for the health and safety of park visitors. To avoid the need for sanitary facilities, public use levels will be managed, where practicable, in accordance with the natural system's ability to absorb human waste. Refuse may not be disposed of in backcountry areas, except that combustibles may be burned where authorized. All other refuse will be carried out. The National Park Service will not provide refuse containers in backcountry areas.

(See Water Quantity and Quality 4:15, Management Facilities 6:5, Use of Wilderness 6:8, Solid Waste Management 9:5, Comfort Stations 9:14)

Fishing. Recreational fishing will be allowed in parks where it is authorized by federal law or where it is not specifically prohibited and does not interfere with the functions of natural aquatic ecosystems or riparian zones. Where fishing is allowed, it will be conducted in accordance with applicable federal laws and treaty rights and state laws and regulations. However, the National Park Service may restrict fishing activities whenever necessary to achieve management objectives outlined in a park's resource management plan.

Commercial fishing will be allowed only where specifically authorized by federal law or treaty right.

(See Implementation Plans 2:9, Planning for Natural Resource Management 4:2, Fisheries Management 4:7, Facilities for Water Recreation 9:14)

Hunting and Trapping. Hunting, trapping, or any other method of harvesting wildlife by the public will be allowed only in parks where it is specifically authorized by federal law. Where such an activity is authorized on a discretionary basis under federal law, it may take place only after the National Park Service has determined that the activity will not compromise public safety and enjoyment and that the proposed use is consistent with sound resource management principles. Where authorized as a discretionary activity, hunting or trapping may take place only pursuant to special regulations.

Hunting and trapping, where authorized, will be conducted in accordance with federal law and applicable laws of the state or states where the park is located. However, the National Park Service may establish regulations or closures that are more restrictive than applicable state regulations based upon a finding that such restrictions are necessary for public safety, resource protection, or visitor enjoyment. Before regulations or other restrictions are implemented by the Park Service, representatives of appropriate state and federal agencies will be consulted. Any such regulations or other restrictions will be developed with public involvement.

(See Population Management 4:6, Management of Harvested Species 4:7, Genetic Resources 4:10)

Off-road Vehicle Use. The use of motor vehicles will be limited to park roads and parking areas and to routes and areas designated for off-road motor vehicle use.

The use of off-road motor vehicles on public lands is governed by Executive Order 11644 amended by 11989, "Use of Off-road Vehicles on Public Lands" (42 USC 4321), which requires in part that routes and areas for off-road vehicle use be designated by agency regulation. Within the national park system, routes and areas may be designated for off-road motor vehicle use only by special regulation and only in national preserves, national seashores, national lakeshores, and national recreation areas. Routes and areas may be designated only in locations where there will be no significant adverse impacts on the area's natural, cultural, and scenic resources and values and in consideration of other visitor uses.

NPS administrative off-road motor vehicle use will be restricted to that required to manage public use of designated off-road vehicle routes and areas, to conduct emergency operations, and to emergencies pursuant to the terms of a cooperative agreement. Deceased persons will be evacuated unless the level of risk to the rescue party is determined to be unwarranted. Search managers and superintendents will jointly determine when to terminate a search.

Individuals engaging in a high-risk recreational activity that requires a permit issued by the superintendent may, as a condition of the permit, be required to reimburse the National Park Service for subsequent search, rescue, or recovery efforts or to provide qualified personnel to assume and carry out those responsibilities.

(See Management Techniques 6:4)

Emergency Medical Services. The National Park Service will make reasonable efforts to provide appropriate emergency medical services for persons who become ill or injured. An emergency medical services program will be maintained to provide transportation of the sick and injured and emergency prehospital care, which may range from minor first aid to advanced life support in various environmental settings. Transportation may include everything from patrol cars and ambulances to fixed-wing and helicopter air ambulances.

Qualified emergency medical services in local communities may be used if they can respond rapidly enough in life-threatening emergencies. Where such services are not available, the National Park Service will make a reasonable effort to provide a level of emergency medical service commensurate with park needs.

Each superintendent will complete an emergency medical needs assessment and develop and implement a program to meet those needs, in accordance with the *Emergency Medical Services Policy and Guideline* (NPS-51).

Fees and Reservations

Basic services will be available to all visitors free of charge. These services include protection, information and orientation, and interpretation to foster an understanding and appreciation of each park's resources, management policies, regulations, and programs. Fees may be instituted for secondary or special services the National Park Service cannot or elects not to offer because of economic constraints or the need for special skills or equipment, or because they are purely supplemental programs. In all cases, fee programs will support park purposes and comply with appropriate NPS policies and standards.

(See Chapter 7: Interpretation and Education)

Recreation Fees. Pursuant to the Land and Water Conservation Fund Act (16 USC 460*l* et seq.), visitors who use federal facilities and services for outdoor recreation may be required to pay a greater share of the cost of providing those opportunities than the population as a whole. Under the guidelines and criteria established by law and regulation, the National Park Service will collect recreation fees of the appropriate type for its parks, facilities, and programs. No fees will be collected under circumstances where the costs of collection would exceed revenue or where prohibited by law or regulation. Fees will be reasonable and will be determined in accordance with the criteria and procedures contained in the Land and Water Conservation Fund Act and regulations in 36 CFR 71.

Reservation Systems. To better serve park visitors, to ensure the protection of park resources, or to improve operational efficiency, the National Park Service may operate a reservation system of its own or participate in a larger system. Such systems may involve campgrounds, other facilities, or other services operated or provided by the Park Service for visitors. Existing systems may be expanded or new systems developed, based on NPS needs.

Superintendents should consider participating in a reservation system whenever visitors consistently experience difficulty in gaining access to a facility or program offered by the Park Service. If a servicewide system already in operation will accommodate the reservation needs of a park, the park will not participate in another type of reservation system.

AIRCRAFT USE

A variety of aircraft types, including military, commercial, general aviation, and aircraft used for NPS administrative purposes, fly over parks. Noise and sonic booms resulting from overflights have the potential to adversely affect park resources and values such as fragile cultural resources, sensitive wildlife species, and the natural quiet of park settings and to interfere with their enjoyment by visitors. The National Park Service will monitor the effects of aircraft overflights on park resources and values and on visitor enjoyment. Since the National Park Service has no direct authority or jurisdiction over airspace above parks, it will actively seek the assistance of the Federal Aviation Administration and appropriate agencies of the Department of Defense to resolve overflight concerns and to prevent, eliminate, or minimize the derogation of park resources and values associated with overflight activity. The 1984 interagency agreement among the National Park Service, the Federal Aviation Administration, and the Fish and Wildlife Service establishes agency responsibilities and procedures to be followed to address site-specific aircraft overflight concerns.

Official NPS use of aircraft in and over parks will be limited to flights needed to support or carry out emergency operations or essential management activities in cases when there are no practical alternatives or when alternative methods would be unreasonable considering such factors as safety, effects on resources and visitor enjoyment, availability of personnel and equipment, impacts on other administrative activities, and overall cost-effectiveness.

To the extent practicable, NPS use of aircraft will be planned and scheduled to consolidate flights and to avoid or minimize adverse impacts on park resources and values and visitor enjoyment. NPS aircraft operations are subject to the regulations and policies of the Department of the Interior Office of Aircraft Services and the Federal Aviation Administration and to the *Aviation Management Guideline* (NPS-60).

Private or commercial aircraft may be operated in parks only on lands or water surfaces designated as landing sites pursuant to special regulations. Landing sites may be designated only where their use will result in no significant adverse impacts on park resources and values, public safety, or visitor enjoyment. Existing sites that meet these criteria and that have been designated as a result of previously established aircraft use may be retained as long as the need for them continues to exist. New sites that meet these criteria may be designated only where essential to provide access to remote areas (other than wilderness) and only where the site can be established, used, and maintained without the need for construction or major site improvements.

(See Noise 4:18, Management Techniques 6:4, Management Facilities 6:5, Navigation Aids 9:11, Miscellaneous Management Facilities 9:16)

NATIVE AMERICAN USE

The National Park Service, to the extent consistent with each park's legislated purposes, will develop and execute its programs in a manner that reflects knowledge of and respect for the cultures, including religious and subsistence traditions, of native American tribes or groups with demonstrated ancestral ties to particular resources in parks. Evidence of such ties will be established through systematic archeological or ethnographic studies, including ethnographic oral history and ethnohistory studies, or a combination of these sources. For purposes of this policy, the term "native American" encompasses American Indians, including Carib and Arawak; Eskimo; Aleut; and native Americans of the Pacific Islands, including native Hawaiians, native Samoans, Chamorros, and Carolinians; and it will be applicable to federally and state recognized tribes and to those native Americans who are defined by themselves and known to others as members of a named cultural unit that historically has shared a set of linguistic, kinship, political, and other distinguishing cultural features.

In developing its plans and carrying out its programs, the National Park Service will ensure the following:

> NPS general regulations on access to and use of natural and cultural resources in parks will be applied in an informed and balanced manner that is consistent with park purposes and does not unreasonably interfere with native American use of traditional areas or sacred resources and does not result in degradation of park resources.
>
> Superintendents will establish and maintain effective consulting relationships with potentially affected native American tribes or groups.
>
> Management decisions will reflect knowledge and understanding of potentially affected native American cultures and people, gained through research and consultations with the potentially affected groups.

The American Indian Religious Freedom Act (42 USC 1996) states that "henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right to freedom to believe, express, and exercise the traditional religions of the American Indians, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." This statute does not create additional rights or change existing authorities, but as a matter of policy in keeping with the spirit of the law, the National Park Service will be as unrestrictive as possible in permitting native American access to and use of traditional sacred resources for customary ceremonials.

The National Park Service will permit members of native American tribes or groups to have access to park areas to perform traditional religious, ceremonial, or other customary activities at places that have been used historically for such purposes. However, requests to conduct native American activities will be subject to the same criteria as other special park uses unless the activity is specifically authorized by federal statute or treaty right.

Members of native American tribes or groups may enter parks for such nonrecreational activities without paying an entrance fee. Performance of these traditional activities at a particular place will not be a reason for prohibiting the use of that area by others except where temporary closings are authorized by law, but the Park Service will not direct visitor attention to the performance of religious observances unless the native American group so wishes.

The National Park Service will protect sacred resources to the extent practicable and in a manner consistent with the goals of the traditionally associated native American tribe or group. The location and nature of sacred sites will be excepted from public disclosure.

The ceremonial use of peyote will be limited to members of the Native American Church during religious ceremonies, in accordance with regulations of the Department of Justice, Drug Enforcement Administration ("Special Exempt Persons, Native American Church," 21 CFR 1307.31).

The National Park Service will regularly and actively consult with traditionally associated native American individuals or groups regarding planning, management, and operational decisions that affect subsistence activities, sacred materials or places, or other ethnographic resources with which they are historically associated. Information about the outcome of these consultations will be made available to those consulted.

(See Ethnographic Resources 5:11, Special Park Uses 8:10, First Amendment Activities 8:11, Collecting Natural Products 8:15, Subsistence 8:16)

SPECIAL PARK USES

A special park use is defined as any activity that is proposed for, or exists within, a park and that requires written permission from an NPS official in order to take place. A special park use may be permitted only if the activity has been judged by the superintendent not to cause any derogation of the values and purposes for which the park was established, unless directly and specifically authorized by federal law.

Each request to engage in a special park use or to renew authorization of an existing use will be reviewed and evaluated by the superintendent according to the terms of applicable legislation, regulations, guidelines, and management planning documents, using criteria and procedures outlined in the *Special Park Uses Guideline* (NPS-53). Initial or renewal requests to conduct an activity will be denied if the superintendent determines that the activity

will conflict with law or policy

will be in derogation of the values and purposes for which the park was established

will be inconsistent with the park's enabling legislation

has reasonable potential to cause illness, personal injury, or property damage

will unduly interfere with normal park operations, resource protection, or visitor use

The National Park Service will also terminate any current activity subsequent to a finding that any of the above conditions exist.

To the extent authorized by applicable legislation, regulations, and policies, the National Park Service will establish and collect appropriate permit fees for special park uses and will seek reimbursement from permittees for NPS costs incurred in administering the permit and monitoring the activities it authorizes.

(See Authorization 2:4, Special Events 8:10)

Special Events

Special events, such as sporting events, pageants, regattas, public spectator attractions, entertainment, ceremonies, and large encampments, may be authorized under permit by the superintendent subject to the same criteria as other special park uses provided that (1) there is a meaningful association between the park and the event, and (2) the event contributes to visitor understanding of the significance of the park.

The National Park Service will not permit the staging of special events that are conducted primarily for the material or financial benefit of participants, that involve commercialization, advertising, or publicity by participants, or for which a separate public admission fee is to be charged, unless the event is directly related to the purposes for which a park was established. Additional guidance and procedures are found in the *Special Park Uses Guideline* and in 36 CFR 2.50.

(See Special Events 6:9, Personal Services 7:2, Interpretation by Others 7:4, Facilities for Arts and Culture 9:12)

First Amendment Activities

The National Park Service will allow public assemblies, meetings, demonstrations, religious activities, and other public expressions of views conducted under the First Amendment of the U.S. Constitution in parks, in accordance with NPS general regulations and provided that a permit has been obtained from the park superintendent. To ensure public safety and the protection of park resources and values and to avoid assigning the same location and time to two or more activities, the Park Service may manage these activities by regulating the time, location, number of participants, use of facilities, and number and types of equipment used, but not the content or message.

Locations within a park that are available for public assemblies and other First Amendment activities, including the sale and distribution of printed matter, will be designated on a map by the superintendent in accordance with criteria found in the NPS general regulations (36 CFR 2.51 and 2.52) unless the sites are otherwise protected from public disclosure, such as sites sacred to native Americans or sites with vulnerable natural and cultural resources. When the National Park Service allows one group to use an area or facility for expressing views, it must allow all other groups a similar opportunity, if requested. No group wishing to assemble lawfully may be discriminated against or denied the right of assembly, provided that all applicable permit criteria and requirements are met. Whenever religious activities are conducted in parks, any NPS actions pertaining to them must reflect a clearly secular purpose, must have a primary effect that neither advances nor inhibits religion, and must avoid excessive governmental entanglement with religion. *

NPS staff on duty at an area in which a First Amendment activity is being conducted will be neutral toward the activity but will remain responsible for the protection of participants, spectators, private property, public property, and park resources. On duty staff may not participate in a First Amendment activity. NPS employees exercising their First Amendment rights when off duty will not imply any official NPS endorsement of the activity.

(See Consultation and Confidentiality 5:12, Confidentiality of Resource Data 5:13)

Rights-of-way

A right-of-way across lands administered by the National Park Service may be issued only pursuant to specific statutory authority and only if there is no practicable alternative to such use of NPS lands. The issuance of rights-of-way over lands administered by the National Park Service is governed by statutory authorities in 16 USC 5 (electrical power transmission and distribution, radio and TV, and other forms of communications facilities), 16 USC 79 (certain other public utilities and water conduits), and 23 USC 317 (highways that are part of the federal aid highway system). Issuance of a right-of-way under 16 USC 5 or 79 is discretionary and conditional upon a finding by the National Park Service that the proposed use is not incompatible with the public interest.

Issuance of a right-of-way under 23 USC 317 is subject to findings specified in 23 USC 138 to be made by the Secretary of Transportation and concurred in by the Secretary of the Interior. There are no general statutory authorities for roads outside the federal aid highway system or for oil or gas pipelines; however, individual park enabling legislation may contain such authorizations. A right-of-way proposed for a park in Alaska is subject to the authorities and procedural requirements of title XI of the Alaska National Interest Lands Conservation Act.

When an application for a right-of-way is submitted, the superintendent will establish conditions, develop documentation of compliance with the National Environmental Policy Act, and establish appropriate fees. Rights-of-way will be executed by the Director. A right-of-way issued by the National Park Service does not convey an interest in land and is revocable for violation of any of its conditions or at the discretion of the Director.

NPS regulations pertaining to the issuance of rights-of-way are in 36 CFR 14; departmental regulations pertaining to rights-of-way in Alaska are found in 43 CFR 36. Additional guidance is in the *Special Park Uses Guideline*.

(See Rights-of-Way 6:9)

Commercial Motion Picture and Still Photography

The making of commercial motion pictures, television productions, or still photographs involving the use of professional casts, settings, or crews will be allowed in parks only pursuant to the terms and conditions of a permit issued by the superintendent. The permit terms will provide for protection of park resources and ensure that filming activities do not conflict with visitor use or administrative activities. Appropriate performance bond and liability insurance requirements will also be imposed, consistent with applicable statutory authorities and regulations. Bona fide news or editorial photography is not commercial and is not subject to the provisions of this policy.

NPS employees, while on duty or in uniform, will not be employed by permittees. Identifiable NPS equipment, uniforms, or insignia will not be portrayed in commercial advertising in any way that would imply NPS endorsement of the product. If the National Park Service incurs unbudgeted costs in monitoring, providing protection services, or otherwise supporting commercial filming activities, then reimbursement of those costs will be obtained from the permittee as a condition of the permit issued for the filming. Additional direction is provided by the *Filming Guideline* (NPS-21).

Mineral Development

Mineral development includes exploration, extraction, production, storage, and transportation of minerals. Mineral development may be allowed in parks only where there are existing valid mining claims, federal mineral leases, or nonfederally owned minerals. If the National Park Service determines that the proposed mineral development would be in derogation of park values and purposes and cannot be sufficiently modified to meet this standard, then the Service will seek to extinguish the associated mineral right through acquisition unless otherwise directed by Congress. In some parks all or certain types of mineral development are specifically prohibited by law.

All persons who conduct mineral development within parks will do so only in conformance with applicable laws, regulations, and NPS policies. These laws include the Mining in the Parks Act (16 USC 1901 et seq.), the Mineral Leasing Act (30 USC 181 et seq.), the Acquired Lands Mineral Leasing Act (30 USC 301 et seq.), the Surface Mining Control and Reclamation Act (30 USC 1201 et seq.), the NPS Act for Administration (16 USC 1a-1), the Alaska National Interest Lands

Conservation Act (16 USC 3101 et seq.), and enabling statutes for individual parks. Mineral development must also conform with regulations in 36 CFR 9A and B and 43 CFR 3100-3500. Persons may not use or occupy surface lands in a park for purposes of removing minerals outside the park unless provided for in law.

General management plans, land protection plans, and other planning documents for parks with mining claims, federal mineral leases, or nonfederally owned mineral interests will address these nonfederal property interests as appropriate. Lands with mineral interests will be zoned according to their anticipated management and use, based on their resource values, park management objectives, and park-specific legislative provisions relating to mineral interests.

(See Management Zoning 2:7, Land Protection Plans 3:1, Criteria for Recommended Wilderness 6:2, Mineral Development 6:10)

Mining Claims. All parks are closed to the location of new mining claims on federal lands under the General Mining Law of 1872 (30 USC 21). The National Park Service may permit mineral development only on existing valid mining claims in conformance with the park's enabling legislation and the regulations for mining claims in 36 CFR 9A. The Park Service will perform a validity examination of a claim before approving a plan of operations in accordance with 36 CFR 9A, except that for some claims in Alaska, operations may be approved based on information available to the Service (such as information contained in the supplemental claim information statement or the findings of a preliminary field examination) prior to the completion of a validity examination. All mineral development and use of resources in connection with a claim will be confined to the boundaries of the claim itself, except for access and transport that are permitted under 36 CFR 9A or, for Alaska, 43 CFR 36.

Federal Mineral Leases. All parks are closed to new federal mineral leasing except for five national recreation areas (Lake Mead, Lake Chelan, Ross Lake, Whiskeytown, and Glen Canyon) where Congress has explicitly authorized federal mineral leasing in each area's enabling legislation. Portions of four of these units and all of Lake Chelan National Recreation Area have been closed to federal mineral leasing by the Secretary of the Interior. No person may explore for federal minerals in any of these areas except under an oil and gas lease issued pursuant to regulations in 43 CFR 3100, or in the case of solid materials, under a prospecting permit issued pursuant to regulations in 43 CFR 3500. Before consenting to a federal mineral lease or subsequent permit in any of these areas, the responsible regional director will determine that leasing, and the subsequent mineral development in connection with leasing, will not result in a significant adverse effect on park resources or administration.

Some park areas contain leases that existed at the time the park was created or expanded. These leases are valid existing rights and will continue to exist until such time as they expire under the regulations that govern federal mineral leasing (43 CFR 3100 and 3500). When such a lease expires, the minerals and lands containing such minerals cannot be leased again.

Nonfederally Owned Minerals. Where the development of nonfederal mineral rights within parks is proposed, the National Park Service will determine whether such development can be undertaken without the derogation of park purposes and values. If the proposal cannot be sufficiently modified to meet this standard, the Service will seek to extinguish the mineral right through acquisition unless otherwise directed by Congress.

NPS regional directors may approve mineral development related to nonfederally owned oil and gas under the regulations in 36 CFR 9B. Until the National Park Service promulgates special regulations to control mineral development of nonfederal minerals other than oil and gas, a regional director may approve operations in connection with such minerals under regulations in 36 CFR 5, which govern "Commercial and Private Operations," provided that such operations do not violate the above stated standard.

Agricultural Uses

Agricultural uses and activities are authorized in parks in accordance with the direction provided by a park's enabling legislation and general management plan. However, agricultural uses and activities may not be conducted in natural zones. Agricultural practices and techniques, including the use of pesticides, are subject to the provisions of federal and state laws, NPS regulations and policies, and the *Special Park Uses Guideline*. In general, agricultural activities should be conducted in accordance with accepted best management practices. The National Park Service may issue leases or special use permits to individuals or organizations to conduct agricultural activities on park lands.

Agricultural activities in cultural zones, including demonstration farms, will be allowed if (1) they conform to those that occurred during the historic period, (2) they do not result in the derogation of park values or purposes, and (3) they support the park's interpretive themes. Agricultural uses that do not conform to those in practice during the historic period may be allowed if (1) they are authorized by federal law, (2) they are retained as a right subsequent to NPS land acquisition, or (3) they contribute to the maintenance of a historic scene. Within agricultural subzones, certain agricultural practices may be allowed or restricted to achieve desirable land uses or NPS management objectives.

NPS and concession employees living in parks may cultivate gardens for personal use in park development zones and cultural zones under terms and conditions established by the superintendent. Such use will not be permitted if it would deplete or pollute water supplies, adversely affect visitor enjoyment of the historic or natural scene, or result in the derogation of park values or purposes. In urban parks, areas may be designated for community recreational gardening under the same conditions.

(See Management Zoning 2:7, Landscapes and Plants 4:8, Pests 4:13, Cultural Landscapes 5:6, Personal Services 7:2)

Grazing

Commercial grazing or stock driveways will be allowed only in those parks where (1) they are specifically authorized by federal law, (2) they were retained as a reserved right arising from NPS land acquisition, or (3) they are necessary to maintain the historic scene. Grazing and stock driveways will be eliminated in all other parks. In parks where authorized grazing occurs, it may be managed by the National Park Service or through an agreement with the Bureau of Land Management or another agency.

The National Park Service will develop a grazing management plan for all parks where grazing occurs, including parks where grazing is managed by other agencies. Grazing will be managed and conducted in accordance with standards and procedures designed to ensure that it does not result in significant damage to park resources. These standards will be achieved through the use of the best grazing management practices possible. The National Park Service will determine the significance of the impacts from grazing activities based upon the organic act, the park's enabling legislation, other applicable legislation, and the values and purposes of the park. Livestock or trail stock will be kept within the carrying capacity of the area to be grazed so that the composition, condition, and distribution of native plant and animal communities and ecosystem dynamics are not significantly altered and so that conflicts with public use are minimized. To protect park resources, restrictions may be placed on class and numbers of animals and locations and periods of use.

Because of the fragile nature of the resources involved, grazing in riparian zones will be discouraged.

No facilities or range developments such as fences, corrals, or water developments, other than those authorized by law or approved for NPS use or concession use, will be allowed in parks to increase livestock numbers or to introduce livestock into areas where they cannot otherwise exist. The National Park Service will not expend funds to construct or maintain commercial livestock facilities unless there is a direct benefit to the protection of park resources. The grazing permittee will be required to remove such facilities when grazing activities are no longer authorized.

Trail stock used by the National Park Service, concessioners, or the public may graze in natural zones of parks only as they pass through these areas. Grazing will be restricted in natural zones whenever necessary to protect park resources and values. The Park Service will generally encourage parties to pack in feed for stock, and will require it where stock grazing would have adverse impacts on park resources.

Where grazing or livestock trailing is otherwise allowed but its continuation would conflict with public enjoyment of park resources or would interfere with the functions of the natural ecosystem, the National Park Service will eliminate grazing, whenever possible, through orderly and cooperative procedures with the individuals or organizations concerned.

(See Management Zoning 2:7, Water Quantity and Quality 4:15, Criteria for Recommended Wilderness 6:2, Grazing and Livestock Driveways 6:9, Equestrian Trails 9:10, Miscellaneous Management Facilities 9:16)

Collecting Natural Products

Collecting natural products for personal use or consumption is governed by NPS general regulations and by the *Special Park Uses Guideline*. A superintendent may designate certain fruits, berries, nuts, or unoccupied seashells that can be gathered by hand for personal use or consumption, including traditional use by native Americans, upon a written determination that such an activity will not adversely affect park wildlife or the reproductive potential of a plant species or otherwise adversely affect park resources. The collection of minerals or rocks will be allowed only when specifically authorized by federal law or treaty rights.

While campfires are a traditional element of camping and the park experience, gathering firewood will be prohibited except where subsistence use is authorized by federal law or in specific areas designated by a superintendent where dead and down wood may be collected for campfires. Natural resource products that accumulate as a result of site clearing for development, hazard tree removal, vista clearing, or other management actions will be recycled through the ecosystem wherever practicable. Where recycling is not practicable, the products may be disposed of. Disposal may be accomplished by contract, if the result of work done under contract and the value is calculated in the contract cost, or by sale at fair market value in accordance with applicable laws and regulations. Wood that accumulates as a result of management actions described above may also be used for park purposes such as heating public buildings or offices or for interpretive campfire programs.

(See Research and Collection Activities 8:15)

Research and Collection Activities

Research activities by non-NPS personnel that, in the superintendent's judgment, might disturb resources or visitors or that require the waiver of any regulation may be allowed in parks only pursuant to the terms and conditions of an appropriate permit. Scientific collecting activities that involve the removal of plants, animals, minerals, or archeological, historical, or paleontological objects will be allowed only if they are (1) proposed in conjunction with authorized research activities and (2) authorized and conducted in accordance with all applicable legislation, regulations, and guidelines (36 CFR 2.5).

(See Science and Research 4:2, Research 5:2, Ethnographic Research and Inventories 5:12, Collecting Natural Products 8:15)

Subsistence

Subsistence uses and access will be allowed only where such activities are specifically mandated by federal law, such as the Alaska National Interest Lands Conservation Act, or treaty rights. Subsistence uses will be conducted in accordance with the provisions of law and consistent with sound management principles and managed so that the composition, condition, and distribution of native plant and animal communities and ecosystem dynamics are not significantly altered.

(See Native American Use 8:8)

Cemeteries and Burials

National Cemeteries. All national cemeteries administered by the National Park Service will be managed as historically significant resources and as integral parts of larger historical parks. Burials in national cemeteries will be permitted, pursuant to applicable regulations, until available space has been filled. Management and preservation of national cemeteries are subject to the provisions of the National Cemeteries Act (38 USC 1000 et seq.), NPS "National Cemetery Regulations" (36 CFR 12), and the *National Cemeteries Management Guideline* (NPS-61).

The enlargement of a national cemetery for additional burials constitutes a modern intrusion compromising the historical character of both the cemetery and the historical park and will not be permitted.

Family Cemeteries. Burial of family members in family cemeteries that have been acquired by the National Park Service in the establishment of parks will be permitted to the extent practicable, pursuant to applicable regulations, until space allotted to the cemeteries has been filled.

Other Burials and Scattering of Ashes. Other burials or reinterments outside established cemeteries in parks will be prohibited except where permitted by cultural resource policies. The scattering of human ashes from cremation may be permitted by a superintendent, in accordance with NPS general regulations.

(See Burial Sites and Cemeteries 5:13, Cultural Resources 6:7, Interpretation and Native Americans 7:5)

Other Special Park Uses

Other special uses of parks that may be allowed under permit or special regulations include use of explosives or fireworks, military operations, use of portable power equipment, and sale and distribution of printed matter. Specific guidance is provided in 36 CFR and the *Special Park Uses Guideline.*

9 Park Facilities

The National Park Service will provide appropriate facilities necessary for resource protection and required for visitor enjoyment of parks. The visitor and management facilities provided by the Park Service and its concessioners will be harmonious with park resources, compatible with natural processes, aesthetically pleasing, functional, as accessible as possible to all segments of the population, energy-efficient, and cost-effective.

GENERAL

The provision of the support structures required to transport, house, inform, and serve visitors and staff requires planning, design, programming, construction, operations, and maintenance.

Facility Planning and Design

Planning and design of park facilities will be accomplished by interdisciplinary teams constituted to meet the environmental, programmatic, and technical requirements of the project. Public input will be sought at the earliest stage of planning and design, particularly in those cases where controversy is likely, or at a later stage if the specific project was not developed in sufficient detail during earlier planning steps to allow effective public input.

Facilities necessary for visitor use and park management will be identified in general management plans, development concept plans, and associated planning documents.

Designs for park facilities, regardless of their origin (NPS, contractor, concessioner, or other), will be harmonious with and integrated into the park environment and will be subject to the same high standards of design and functionality and to the same review and approval processes, including inspection while construction is underway.

(See Park Planning Process and Products 2:4)

Life-Cycle Costs. All costs, including initial construction costs, ongoing maintenance costs, and operating costs, will be considered in the planning, design, and construction of facilities.

Location. Major facilities within park boundaries will be placed only in development zones established by the park's approved general management plan. Where authorized, major facilities may also be located outside park boundaries in the vicinity of the park. Where possible and appropriate, the Park Service will establish and maintain cooperative administration/information facilities with other federal, state, or local entities. When structures that are not historically significant are determined to be inappropriately placed in prime resource areas, they will be removed.

(See General Management Plan 2:6, Treatment of Cultural Resources 5:5, Management Facilities 6:5)

Adaptive Use. Adaptive use of historic and nonhistoric buildings for uses such as visitor centers, hostels, and administrative offices will generally be considered before new construction, assuming that an existing building can meet park objectives and its use will not be an intrusion on significant natural or cultural resources. Facility development is subject to section 110 of the National Historic Preservation Act (16 USC 470 et seq.), which states that available historic properties will be used to the maximum extent feasible prior to acquiring, constructing, or leasing other buildings. Use of historic buildings will comply with all laws, regulations, and policies regarding the treatment and use of cultural properties.

(See Planning and Proposal Formulation 5:4, New Construction 5:7, Use of Historic Structures 5:8, Accessibility for Disabled Persons 9:3)

Integration of Facilities into the Park Environment. Facilities will be integrated into the park landscape and environs so as to cause minimum impact. Development will not compete with or dominate park features.

A cohesive design theme will reflect the purpose and character of the park, or of an individual developed area of a large park. Standard designs and components may be used, but they will be adapted as appropriate to the specific site and conditions as part of the design process.

Full integration of facilities into the park environment will involve

> innovative concepts for grouping facilities and activities, both in design of new development and in redesign of existing complexes, building on the architectural and landscape elements already present
>
> thorough resource and user analyses
>
> sensitivity to cultural, regional, aesthetic, and environmental factors in the selection of site, materials, and forms
>
> knowledge of values and other sociocultural concerns of park associated ethnic groups

(See Protection of Cultural Values 9:2, Visitor Centers 9:11, Siting Facilities to Avoid Natural Hazards 9:2)

Protection of Cultural Values. In cultural zones, new visitor or administrative structures will harmonize with the area and its cultural resources in proportion, color, and texture. No attempt will be made to duplicate or mimic a historic design, nor will any modern construction be portrayed to the public as historic. Application of the criteria of effect promulgated by the Advisory Council on Historic Preservation and compliance with the Council's regulations on "Protection of Historic Properties" (36 CFR 800) will precede any development. These criteria will apply to all historic properties even if they are not included within a cultural zone.

(See Resource Identification, Evaluation, and Registration 5:1, Planning and Proposal Formulation 5:4, New Construction 5:7)

Siting Facilities to Avoid Natural Hazards. Facilities will not be located in areas where natural processes pose a persistent threat unless no practicable alternative site exists and unless all safety and hazard probability factors have been considered. Hazardous areas include sites with unstable

U.S. handcrafts and authentic native American handcrafts will be exempt from the franchise fee payment. *

So far as is practical, merchandise offered in each category should represent a range of price and quality. Foreign-made merchandise is not encouraged but will not be prohibited.

Concessioners may not sell merchandise that violates conservation principles. The sale of original prehistoric or historic archeological artifacts or vertebrate paleontologic specimens is prohibited. Clearly labeled replicas of such artifacts and specimens may be sold. More detailed definitions of handcrafts and of prohibited items are contained in the *Concessions Management Guideline.*

(See Cultural Demonstrators 7:4, Cooperating Associations 10:4)

Interpretation. Concessioners will provide all authorized services in ways that are consistent with and supportive of the interpretive themes, goals, and objectives of the parks where they operate. Where practicable, concessioners will be encouraged to assist in park interpretation as a method of supplementing park staff and funds and contacting more park users. Concessioner interpretive efforts will be directed and monitored by the National Park Service to ensure that they meet the quality standards applied to NPS interpretive programs, exhibits, and displays.

(See Nonpersonal Services and Media 7:3, Interpretation by Others 7:4)

Reservations and Conventions. Concessioners may accept reservations and deposits for visitor services, so long as procedures are established to ensure that

> the primary purpose of the concessioner accommodations and services will continue to be to provide for general public use and enjoyment of the parks
>
> services will be available to a broad spectrum of visitors
>
> no one category of visitors will gain special privileges, whether through group affiliation, prepayment of substantial advance rental, or other means

Group tours will be encouraged throughout the season, but in balance with demand from visitors who travel independently. Concessioners will be encouraged to seek convention business in the off-seasons and at other times when facilities are underutilized, because resulting revenues may provide the margin needed to keep the concession operation open for the general public.

Recycling and Beverage Container Program. The National Park Service encourages the use of biodegradable, recyclable, or reusable materials so as to minimize solid waste and conserve natural resources to the fullest extent possible. Concessioners are required to use recyclable containers where there is a market for such containers within a reasonable distance. All beverage containers will be returnable unless the superintendent determines that the recycling of such containers would be impractical. Criteria for exceptions are set forth in the *Concessions Management Guideline.*

(See Solid Waste Management 9:5)

Viewing Devices. Concessioners may install and operate viewing devices (pedestal binoculars or telescopes) at appropriate park locations when the superintendent determines that such devices are desirable for meaningful interpretation or understanding of the resource. The superintendent will approve in writing their number, location, an appropriate maintenance standard, and whether they are to be free or coin-operated. If coin-operated, the rate to be charged will be approved by the superintendent and be administered under a concession authorization.

(See Chapter 7: Interpretation and Education; see also Viewing Devices 9:12)

Other

Advertising. In accordance with 36 CFR 5.1, advertising within the park will be permitted only for those goods, services, and facilities within the park and if deemed to be necessary for the convenience and guidance of the public and approved by the superintendent in writing. Billboard advertising is prohibited in NPS-administered areas and discouraged outside parks. All concessioner advertising and other public information materials are subject to prior approval by the National Park Service.

Employment of NPS Personnel or Family Members. All instances of employment by a concessioner of the spouse or minor children of an NPS employee will have the prior written approval of the official in charge of the employee's park or office (superintendent, regional director, or Director). Such approval will generally be granted except for the spouses or minor children of excepted persons, which is defined to mean superintendents, assistant superintendents, concession specialists, and others who have official responsibilities for concession management, evaluation, rate approval, or contract compliance concerning that particular concessioner. Approval for concession employment of these excepted persons may be granted only by the Director.

No NPS employees or their resident family members may be owners, partners, corporate officers, or general managers of any business conducting commercial visitor services in a park, nor may NPS employees or their resident family members have a financial interest in such a company. Ownership of stock shares traded in a recognized open market is not considered a financial interest under this policy. Excepted persons and their families, however, may not own stock shares in concessions for which they have concession management responsibility.

Accepting Reduced Rates and Items of Nominal Value from Concessioners. NPS employees may not receive concessioner goods or services at a discount unless it is in connection with official business, is to the government's advantage, and is provided for under the terms of the concession authorization. Employees may, however, accept the same reduced rates or discounts offered by the concessioner to the general public.

NPS employees may not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value from a concessioner or other person who conducts operations or activities that are regulated by the Department of the Interior. However, employees may accept food and refreshments of nominal value on infrequent occasions in the ordinary course of official luncheon or dinner meetings where an employee may properly be in attendance, and they may accept unsolicited promotional material of nominal value from concessioners. The Office of Government Ethics interprets luncheon or dinner meetings to include real working meetings where the meal is incidental, large group affairs at which the employee is the guest speaker, or an affair which is covered by an approved agency exception. Since the regulations governing this matter (43 CFR 20.735) are subject to interpretation, to avoid any conflict of interest or appearance of such conflict, employees should consult with their assistant ethics counselor on specific situations.

Fund Raising and Philanthropy. The National Park Service will neither knowingly solicit nor accept gifts from concessioners or their principals or beneficial owners, nor permit others to do so on its behalf, when such gifts may involve a conflict of interest or an appearance of conflict or when a gift is to be used for a service to or on behalf of a concessioner. The National Park

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United States Department of the Interior

BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

IN REPLY REFER TO:
8160(341)

July 28, 1989

Instruction Memorandum No. 89- 621
Expires 12/31/89

To: AD's 200, 500, 700; SCD; SD's

From: Director

Subject: Review of Draft Manual Section 8160, Native American Coordination and Consultation DD: 10/2/89

Please review the attached draft and return your comments to the Director (340) by October 2, 1989.

This draft manual was prepared over the past 15 months by a workgroup representing Alaska, Arizona, California, Idaho, Oregon, and the Washington Office. Bob Laidlaw of the California State Office chaired the workgroup.

Native American concerns may have significant bearing on land and resource management decisions. Previous guidance has identified planning and environmental review as the primary procedural systems for considering the concerns and for involving Native Americans in the decisionmaking process. However, there has not been a single location in BLM's manual system to provide a comprehensive reference on authorities, responsibilities, and program relationships.

As will be evident in your review, the responsibility for giving adequate consideration to Native American concerns crosscuts program boundaries. Please ensure that the draft is reviewed broadly, preferably to include managers, planners, environmental coordinators, and staff in the programs identified in .07A2 of the draft.

Questions may be addressed to John Douglas, Branch of Recreation and Cultural Resources (341), 3360 MIB or FTS 343-9353.

Frank W. Snell
Chief, Division of Recreation, Cultural and Wilderness Resources

1 Attachment
Attachment 1 - Native American Coordination and Consultation (16 pp.)

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8160 - NATIVE AMERICAN COORDINATION AND CONSULTATION

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.01 Purpose
.02 Objectives
.03 Authorities
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Glossary of Terms

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8160 - NATIVE AMERICAN COORDINATION AND CONSULTATION

.01 Purpose. This Manual Section is intended to provide a single location within the BLM Manual system for information and direction on BLM's various Native American coordination and consultation responsibilities; to clarify legal relationships between BLM and Native American groups; and to bring attention to administrative and management issues arising from those responsibilities and relationships.

.02 Objectives. The objectives of the Native American coordination and consultation component of the cultural resource management program are to:

A. Inform managers and staffs of the responsibilities of various BLM programs for ensuring that Native American issues and concerns are given equitable and legally adequate consideration during decision making.

B. Describe the special legal entitlements of tribal governments and other Native American groups relative to management of the public lands and public land resources.

C. Promote regular exchange of information among programs having responsibilities for identifying and considering Native American issues and concerns.

D. Provide guidance for collecting, evaluating, applying, and protecting sensitive information relating to Native American concerns.

.03 Authorities.

A. General Administrative Authorities.

1. National Environmental Policy Act of 1969 ("NEPA"; P.L. 91-190; 83 Stat. 852; 42 U.S.C. 4321) establishes national policy for protection and enhancement of the human environment. Part of the function of the Federal Government, as stated in the Act, is to "preserve important . . . cultural . . . aspects of our national heritage and maintain whenever possible an environment which supports diversity and variety of individual choice."

2. Federal Land Policy and Management Act of 1976 ("FLPMA"; P.L. 94-579; 90 Stat. 2743; 43 U.S.C. 1701) requires comprehensive inventory and long-range land and resource planning, and directs the Secretary to manage the public lands in coordination with other Federal agencies, State and local governments, and Indian tribes. Section 103(a) directs special attention to the protection of "important . . . cultural . . . values."

3. American Indian Religious Freedom Act of 1978 ("AIRFA"; P.L. 95-341; 92 Stat. 469; 42 U.S.C. 1996) resolves that it shall be the policy of the United States to protect and preserve for the American Indian, Eskimo, Aleut, and Native Hawaiian the inherent right of freedom to believe, express and exercise their traditional religions, including but not limited to access to religious sites, use and possession of sacred objects, and freedom to worship through ceremonials and traditional rites. Federal agencies are directed to evaluate their policies and procedures to determine if changes are needed to ensure that such rights and freedoms are not disrupted by agency practices. The Act, a specific expression of First Amendment guarantees of religious freedom, is not implemented by regulations. (Note: A U.S. Court of Appeals has determined that there is a compliance element in the American Indian Religious Freedom Act, requiring that the views of Indian leaders be obtained and considered when a proposed land use might conflict with traditional Indian religious beliefs or practices, and that unnecessary interference with Indian religious practices be avoided during project implementation, but specifying that conflict need not necessarily bar Federal agencies from adopting proposed land uses in the public interest. Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1983).)

4. Indian Self Determination and Education Assistance Act (P.L. 93-638; 88 Stat 2203; 25 U.S.C. 450) provides direct and primary authority to tribal governments to contract and regulate programs and services, and also provides authority for tribal governments to acquire lands adjacent to reservations for purposes of the Act.

5. Alaska Native Claims Settlement Act (P.L. 92-203; 85 Stat. 688; 43 U.S.C. 1601) establishes a "fair and just settlement of all claims by Natives and Native groups in Alaska, based on aboriginal land claims," with the settlements to be "accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives . . . [and] with maximum participation by Natives in decisions affecting their rights and property . . . ."

6. Indian Reorganization Act of 1934 (P.L. 73-576; 48 Stat. 984; 25 U.S.C. 461) establishes tribal self government for many Native American groups. The Act further provides for the adoption of a tribal constitution and the incorporation of tribal governments. Tribal governments, so constituted, have primary jurisdiction over the lands of the tribe and are empowered to negotiate with Federal, State and local governments in all matters affecting the tribe. Pursuant to this Act, tribal governments are judicially considered to hold sovereign immunity in all governmental matters affecting the tribe (425 US 903, 96 S.Ct. 1492, 47 L.Ed2d. 752 (1976)).

7. Indian Mineral Development Act of 1982 (P.L. 97-382; 96 Stat. 1938; 25 U.S.C. 2101) provides authority to Indian tribes to develop mineral resources, and to enter into joint venture agreements, operating agreements, and leases. The Act conveys and extends tribal authority to regulate and cooperate with private and governmental entities in the development of domestic energy and mineral resources.

8. Indian General Allotment Act of 1887 (R.S. Chap. 119; 24 Stat. 388; 25 U.S.C. 334) provides for the allotment of lands to individual Indians for the purpose of settlement and subsistence through pastoral pursuits. Similar provisions were made for Alaska Natives in a 1906 Act.

9. Alaska National Interest Lands Conservation Act (P.L. 96-487; 94 Stat. 2371; 16 U.S.C. 3101) establishes various conservation system units in Alaska to preserve lands and waters with nationally significant values, including historic, archaeological, and cultural values. The Act directs that, consistent with the conservation of healthy populations of fish and wildlife, utilization of public lands in Alaska is to cause the least impact on rural residents who depend on subsistence uses of the resources of such lands. It also authorizes the Secretary, upon request, to advise, assist, and provide expertise to a Native corporation or group for preservation, display, and interpretation of cultural resources, and to provide training in identification, recovery, preservation, demonstration, and management of cultural resources.

B. Cultural Resource Authorities.

1. National Historic Preservation Act (P.L. 89-665; 80 Stat. 915; 16 U.S.C. 470) addresses preservation of historic properties, including historical, archaeological, and architectural sites, structures, and objects, that are eligible for the National Register of Historic Places. In some cases, properties may be eligible in part or wholly because of their historical importance to Native Americans. Federal agencies must take into account effects of their undertakings on eligible properties. An amendment to the Act requires the Secretary in cooperation with the American Folklife Center of the Library of Congress to recommend ways to preserve and conserve intangible elements of our cultural heritage and to encourage continuation of diverse cultural traditions (see .03B3 below).

2. Archaeological Resources Protection Act of 1979 (P.L. 96-95; 93 Stat. 721; 16 U.S.C. 470aa) provides for the protection and management of archaeological resources, and specifically requires notification of the affected Indian tribe if archaeological investigations proposed in a permit application would result in harm to or destruction of any location considered by the tribe to have religious or cultural importance. The Act directs consideration of the American Indian Religious Freedom Act (see .03A3 above) in the promulgation of uniform regulations for the Act.

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3. American Folklife Preservation Act of 1976 (P.L. 94-201; 86 Stat. 1129; 20 U.S.C. 2101) creates the American Folklife Center in the Library of Congress and directs the Center to preserve and present American folklife through internal and cooperative programs. (See .03B1 above.)

C. Treaties. Treaties constitute negotiated settlements between sovereign parties, and as such hold a unique status in defining Federal obligations toward Indian tribes. Rights reserved to Indian tribes vary significantly from treaty to treaty. Hunting, fishing, and gathering rights and certain other land uses are the most common rights reserved through treaty. Tribes often refer to treaties in representing their interests and validating their position in contacts with Federal agencies. While BLM managers and appropriate professional staffs should be aware of the terms of relevant treaties, the BLM's specific responsibilities are defined through Federal law and regulations.

.04 Responsibility.

A. Director, through the appropriate Assistant Directors, is responsible for:

1. Overall direction, leadership, and coordination in setting, implementing, and evaluating broad policy for the BLM's Native American coordination responsibilities.

2. Development of guidance, procedures, and directives for Native American coordination as required by various BLM offices. This is accomplished through and/or in consultation with appropriate Washington Office divisions and staffs.

3. Coordination of contacts with other Federal bureaus, agencies, and departmental offices in Washington, D.C. regarding Native American concerns, in consultation with appropriate Washington Office divisions and staffs.

B. State Directors, within their respective jurisdictions, are responsible for:

1. Directing the accomplishment of Native American coordination and consultation responsibilities.

2. Developing technical and policy guidance, information, strategies, procedures, and directives as required.

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3. Establishing and maintaining contacts with other regional level Federal bureaus, agencies, and departmental offices regarding Native American concerns.

4. Developing and distributing to District Offices listings of federally recognized Indian tribes, and other Native American groups as appropriate, residing within their areas of administrative jurisdiction.

C. District Managers or Area Managers, as appropriate, are responsible for:

1. Identifying Indian tribes, Indian groups that have petitioned the Secretary for recognition as Indian tribes, and other Native American groups as appropriate, with aboriginal and/or historic ties to lands under their administrative jurisdiction, regardless of residence.

2. Identifying Native American concerns relating to all BLM actions and programs within their respective areas of jurisdiction.

3. Giving adequate consideration to Native American concerns within their respective areas of jurisdiction.

D. Cultural Resource Specialists, in consultation with other knowledgeable staff, are responsible for providing professionally sound information, recommendations, and advice to managers regarding traditional Native American uses of public lands, Native American traditional lifeway values, and cultural properties that may be associated with those values.

E. All Field Personnel are responsible for being familiar with the legislative requirements outlined in .03 above and for ensuring that their actions and recommendations do not overlook Native American concerns; for reporting to appropriate officials any Native American concerns that are identified to them; and for assisting in the BLM's execution of its Native American coordination and consultation responsibilities.

.06 Policy. It is the policy of the BLM to:

A. Recognize traditional Native American cultural and religious values as an important, living part of our Nation's heritage, and develop the capability to address adequately any potential disruption of the traditional expression or maintenance of these values that might result from BLM land use decisions.

B. Coordinate and consult regularly with appropriate Native American groups to identify and consider their concerns in BLM land use planning and decision making, and document fully all coordination and consultation efforts.

C. Review land use planning decisions and other major BLM decisions for consistency with tribal land use and resource allocation plans (including Alaska Native village or regional corporation plans, as applicable).

D. Participate in developing consistent interagency policies, procedures, and expertise to address Native American and tribal government issues.

E. Avoid unnecessary interference with Native American religious practices whenever possible.

.07 Program Relationships.

A. Relationship to BLM Programs. Although Native American coordination and consultation may relate to particular lands, resources, and BLM management programs, specific Native American concerns are likely to cross-cut program boundaries and involve several programs simultaneously. The BLM's land use planning system and environmental review process, which generally operate at a level above individual programs and which include effective mechanisms for public participation, are well suited to identifying and addressing Native American issues and concerns.

1. Relationship to General Administrative Procedures. Land use planning and environmental review shall be the principal procedural systems for giving Native American cultural and religious issues due consideration, including the opportunity for direct input from those affected. During the collection and evaluation of land use and resource information, before the preparation of land use plans and environmental documents, responsible managers and staff shall employ appropriate techniques to ensure the identification and consideration of Native American cultural and religious values potentially affected by BLM land use decisions. At a minimum, Native American cultural and religious issues shall be addressed during inventory and public participation steps, as outlined below:

a. Inventory. At the start of planning and environmental review, multi-disciplinary teams should be used to define and consider Native American issues and conflicts as they apply to various proposed program decisions and actions.

(1) Special techniques may be needed to identify relevant information. These techniques may include:

(a) Ethnohistoric and ethnographic literature reviews.

(b) Interviews with knowledgeable members of the Native American community, who may or may not be official representatives of the tribal government or Native corporate entity.

(c) Problem-oriented ethnographic field work focusing on Native American cultural and religious values.

(2) Interviews and ethnographic field work should be limited to cases where little or no information exists on specific Native American communities. Before any proposed ethnographic field work or related data collection projects are begun, they must be reviewed by BLM planning and resource management personnel and approved by the responsible manager, and they must also be reviewed and approved by appropriate official representatives of the specific Native American communities where field work would be conducted. The BLM must observe appropriate safeguards for collection and use of, and access to, potentially sensitive information acquired through direct ethnographic techniques. This may include locational information and the names of interview subjects or other contacts who are not official governmental representatives of affected groups.

b. Public Participation. Native American issues and concerns will be identified, in part, through standard public participation techniques (e.g., scoping, public notices, and informational mailings). In addition, managers shall establish any additional effective means needed for notifying Native American groups of any proposed actions which may affect traditional religious or cultural practices. This may in some cases necessitate direct face-to-face communication with persons such as traditional religious practitioners who are not official governmental representatives of affected groups.

c. Consideration During Decision Making. Managers shall ensure that information on Native American religious and cultural issues receives good faith consideration in the decisionmaking process, and that BLM decisions do not unduly or unnecessarily burden the pursuit of traditional religion or traditional lifeways.

d. Consultation and Consistency Review. As part of its responsibilities under Sec. 202(c)(9) of FLPMA, the BLM shall, to the extent practicable, ensure consistency with affected Native American tribal or corporate land and/or resource plans. Native American cultural and religious issues shall be part of this consistency review.

e. Special Designations. Designation of Areas of Critical Environmental Concern, nomination to the National Register of Historic Places, recommendation to the Secretary for designation of National Historic Landmarks, and other appropriate forms of special recognition may be proposed and should be considered as potential means for ensuring continuing attention to Native American cultural concerns.

f. Documentation. Environmental impact statements and environmental assessments should ordinarily serve as the primary documentation of the identification steps taken and the consideration given to Native American cultural and religious concerns. Applying NEPA categorical exclusions does not relieve the BLM of its responsibility, under statutes other than NEPA, to consider potential impacts of BLM actions on Native American cultural or religious values. If categorical exclusions are applied, appropriate non-NEPA documents shall be used for substantiating identification and consideration.

g. Agreements. Written agreements, such as Memoranda of Understanding between the BLM and Native American groups, may be considered for development where needed to define relationships, issues of concern, contacts, and coordination and consultation procedures.

2. Relationship to Specific BLM Resource Management Programs.

a. Lands. Lands actions that change ownership or use of public lands may require attention to Native American concerns. Land tenure adjustments, withdrawals, and occupancy and use authorizations may require particular consideration of Native American needs and requests (e.g., continued access for religious practices or traditional uses, tribal land base expansion, etc.). Some Lands actions pertain only to Native American applicants, such as allotments, trust land annexations, and others. Such applications shall be processed in the same manner as other over-the-counter applications made by non-Native citizens, unless specified and prioritized in an approved land use plan or amendment. Applications submitted by tribal or corporate governments can be presumed to meet coordination and consultation requirements.

b. Wildlife and Fisheries. Discretionary habitat improvements for game species should give priority, when feasible, to species valued by tribal groups, in accordance with usual and accustomed uses in ceded or other lands, where provided for in treaties. Native American values should be considered also in the development of habitat management plans for nongame species of concern to Native American groups (e.g., eagles).

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c. Forestry. Resource allocations and use authorizations should be sensitive and responsive to Native American requirements for the noncommercial use of renewable forest and woodland products (e.g., firewood, house logs, roots, berries, medicinal plants, ritual plants), to accommodate demand. Allocations may involve monitoring to evaluate such uses. Discretionary forest and woodland management activities (e.g., herbicide spraying, commercial pinyon nut harvesting) should involve tribal input, as appropriate. Special authorizations relating to subsistence uses in Alaska will follow developed policy in that State.

d. Soil, Water, and Air. Any actions affecting water use must provide for Native American water requirements in accordance with established treaty rights and as confirmed by the responsible State water right authority or pertinent legal decisions. Native American water rights based on reserved water rights are not covered by State law but in many cases have been perfected under State water right adjudications. For those cases where reserved rights are not certain, it may be necessary to clarify these rights through the Office of the Solicitor.

e. Minerals Programs. Native American concerns should be considered when mineral development is proposed within areas having traditional cultural or religious importance, as identified in land use plans. For example, stipulations may be needed in geothermal leases to protect sacred hot springs. Leasable minerals underlying trust lands will be administered in accordance with the Indian Mineral Development Act of 1982.

f. Rangeland. In the administration of the grazing management and range improvement programs, due consideration must be given to Native American rights consistent with treaties and as requested by tribal groups having such vested rights. For example, grazing season-of-use modifications may be needed to accommodate Native American use of certain resources, as provided by various programs. Vegetation treatments (e.g., burning, chaining, spraying, seeding) should be weighed in consideration of tribal needs, as requested (e.g., nontreatment of traditional plant use zones).

g. Cultural Resources. Cultural resource identification, use allocations, use permits, public interpretation, and protection projects may require consultation with Native American groups as appropriate to the cultural resources or areas affected. Preparation of ethnographic elements in class I inventories may include participation by tribal consultants and tribal review for accuracy and sufficiency.

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h. Wilderness. Wilderness study reports and wilderness management plans should give priority consideration to access by Native American elders or other traditionalists who may require transportation by motorized vehicle. Wilderness designation may afford protection, from incompatible use of development, to natural landscapes that provide resources and/or locations for various activities by traditionalists, such as gathering medicinal plants and conducting religious ceremonies. However, designation and management of wilderness may also present obstacles to traditional uses, and it is important that potential obstacles be identified and given adequate consideration.

i. Recreation. Native American concerns should be considered when collecting recreation inventory information, preparing recreation management plans, establishing use limitations, and processing special recreation use permits. For example, visual resource management classification should account for landscapes with attributed sacredness; seasonal off-road vehicle limitations might be necessary when traditional uses could be disrupted; and areas essential for subsistence or ritual activities might need to have organized recreation use channeled away from them. Programs and materials for interpreting areas or subjects related to traditional Native American cultures should consider and incorporate the perspectives of the Native Americans as appropriate.

B. Relationship to Other Federal Agencies.

1. Planning. In the review of other Federal agencies' land use plans under Section 202(c)(9) of FLPMA, special attention should be given to consistent interagency recognition and consideration of Native American issues and concerns.

2. Environmental Review. When the BLM acts as lead agency for the environmental review of a proposed action that would affect other agencies' lands, the BLM is responsible for identifying Native American concerns and issues for all potentially affected lands, through consultation with cooperating agencies, through the NEPA scoping process, and through other appropriate information gathering methods.

3. Exchange of Information. The BLM and other Federal agencies should routinely share pertinent nonconfidential information about Native American concerns and issues. Sensitive information obtained under promise of confidentiality may not be shared without explicit permission from its source.

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4. Cooperation. The BLM should explore opportunities with other Federal agencies to foster and improve opportunities for tribal governments and other Native American groups to enter into cooperative agreements (e.g., education, training, interpretation, museum work/curation, basic data collection, and ethnographic inventory) with Federal agencies.

C. Relationship to State and Local Governments.

1. Consistency. In addition to land use planning consistency under Section 202(c)(9) of FLPMA, the BLM shall ensure that its policies and procedures are consistent, to the extent allowed by Federal law, with State and local government requirements relating to Native American concerns. The BLM should implement its programs, as they relate to Native American concerns, as consistently as practical with State and local laws and ordinances. However, where Federal lands are concerned, Federal law has precedence over State and local law.

2. Exchange of Information. The BLM should share information relating to Native American issues and concerns with State and local governments in the same manner and with the same limitations as outlined in .07B3 above.

D. Relationship to Native American Governments.

1. Federally Recognized Tribes. Federally recognized tribal governments are the legal representatives for tribal memberships to exercise and control the rights and privileges held through treaties, executive orders, and agreements with the United States, both on and off reservations. The unique legal status created by treaties and executive orders and the structure of tribal governments establish the necessity for a government-to-government relationship between the BLM and the recognized tribal governments. Specific tribal government authorities and responsibilities are defined in constitutions and bylaws of the tribes.

2. Alaska Native Corporations. The BLM in Alaska relates to regional profit and nonprofit Native corporations established under provisions of the Alaska Native Claims Settlement Act (see .03A5 above) as the primary units for Native American coordination and consultation concerning certain lands and planning issues. The BLM also coordinates with the regional profit and nonprofit Native corporations to identify any additional needs for involving Alaska Native groups in coordination and consultation.

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E. Relationship to Native American Advocacy Groups. The BLM notifies and considers the views of groups advocating positions of general interest to Native Americans in the same manner as it notifies and considers the views of other advocacy or special interest groups. The concerns of these groups are considered through BLM's normal land use planning and NEPA compliance processes.

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Glossary of Terms

(See also Manual Section 8100, Glossary of Terms.)

-E-

ethnography: the structured and systematic, fieldwork-based study and description of specific cultures.

-F-

fiduciary responsibility: the trust responsibility of the United States, executed through the Secretary of the Interior, to uphold obligations of the Federal Government to Native American groups. Court decisions have interpreted this responsibility to extend to all Federal agencies. For BLM, this obligation requires a reasonable and good faith effort to identify and consider, and to carry out programs in a manner sensitive to, and consistent with, Native American concerns and tribal government planning and resource management programs.

-G-

government-to-government relationship: the formal relationship that obtains between agencies of the Federal Government and tribal governments under the laws of the United States. Tribal governments are considered domestic sovereignties with primary and independent jurisdiction (in most cases) over tribal lands. Concerning BLM actions, the same level of consideration and consistency review provided to other agencies or governmental jurisdictions must be afforded to Indian tribes.

-I-

Indian group: any Indian aggregation within the continental United States, which the Secretary of the Interior has not recognized as possessing tribal status.

Indian lands: lands held in trust by the United States for individual Indians or tribes, or lands titled to individual Indians or tribes subject to Federal restrictions against alienation or encumbrance.

Indian tribe: any Indian group in the continental United States that the Secretary of the Interior recognizes as possessing tribal status (listed annually in the Federal Register).

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-N-

Native American: a member of any of the indigenous cultural groups of the western hemisphere, including American Indians, Alaska Natives, Native Hawaiians, and other indigenous peoples.

-R-

reservation: lands acquired in ownership by American Indian tribal governments through aboriginal possession, treaty, act of Congress, Executive action (including action by the Secretary of the Interior pursuant to certain statutes), and/or by action of a colony, State, or foreign nation.

reserved rights: those rights not specifically ceded in a treaty or agreement are considered to be reserved consistent with the purposes of the United States and the Indians entering into a transaction or formal relationship. Rights may include hunting, fishing, and gathering privileges, or water and other resource use guarantees.

-S-

sociocultural use area: an area of the public lands used by Native Americans for purposes of religious expression, resource gathering, or other traditional uses.

subsistence use: the customary and traditional use by Native Americans of renewable resources on the public lands. For Alaska, specific statutory definition of "subsistence uses" is ". . . the customary and traditional uses by rural Alaska residents of wild renewable resources for direct personal or family consumption as food, shelter, clothing, tools, or transportation; for the making and selling of handicraft articles out of non-edible by-products of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

-T-

tradition: longstanding, socially conveyed, customary patterns of thought, cultural expression, and behavior, such as religious beliefs and practices, social customs, and land or resource uses. Traditions are shared generally within a social and/or cultural group and span generations.

traditional: conforming to tradition.

treaty: a formal agreement between the United States and one or more Native American groups. Typically, these agreements ceded lands to the United States, reserving certain rights, privileges, and/or lands to the Native American signatories.

tribal government: the formal representative governing body of a reservation or Indian community (as defined in 25 CFR 61 and published annually in the Federal Register).

tribe: (See "Indian tribe.")

trust responsibility: (See "fiduciary responsibility.")

.14 Notices, Consultations, and Hearings.

A. State Historic Preservation Officer (SHPO). Prior to plan approval, the SHPO must be consulted concerning any management actions which may be directly implemented upon plan approval and which may have an effect on a cultural property eligible for the National Register of Historic places. (See 36 CFR 800.) While the formal consultations required under Section 106 of the National Historic Preservation Act are usually conducted during activity planning, the SHPO should be consulted during resource management planning concerning cultural resource evaluation recommendations (cf. 36 CFR 800.4(c)). If these recommendations are jointly agreed to, a major portion of future Section 106 consultation requirements will have been satisfied in advance of specific land use proposals.

B. Indian Tribes. Pursuant to the American Indian Religious Freedom Act, Indian tribal leaders should be consulted with respect to any management objectives and actions which might affect tribal religious values. Under a court decision (Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983)), Federal agencies must obtain and consider the views of Indian leaders during the land use decisionmaking process, and avoid unnecessary interference with Indian religious practices during project implementation. In Alaska, the term "Indian tribes" may include Native American villages and corporations, as appropriate.

2. State and local government sources: State Land Department officials and land records, county courthouse records, State, local and tribal land use plans and zoning ordinances, State water resource management plans, records of the State water engineer, and economic development plans/projections of government entities and local universities.

3. Other Federal agency sources: Soil Conservation Service soil surveys and maps and flood zone maps, approved land use plans, and the planning staffs and managers of other Federal agencies including the Forest Service, Park Service, Bureau of Reclamation, Bureau of Indian Affairs, Fish and Wildlife Service, and Army Corps of Engineers.

4. Private sector sources: planning departments of major utility companies and natural resource companies (e.g., energy, timber, mining, or land development), and verbal or written communications with public land users and adjacent land owners.

.24 Notices, Consultations, and Hearings. State and local governments and Indian Tribes having interest in or jurisdiction over lands proposed for disposal or acquisition should be consulted during planning to solicit their views and to avoid conflicts with State and local plans and programs.

Form 1221-2
(June 1969)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

MANUAL TRANSMITTAL SHEET

Release
1-1547

Date
10/25/88

Subject

H-1790-1 - NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK

1. Explanation of Material Transmitted: This Handbook provides instructions for compliance with the Council on Environmental Quality's (CEQ) Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Parts 1500-1508) and the Department of the Interior's manual guidance on the National Environmental Policy Act of 1969 (516 DM 1-7). The Handbook is intended for use by Bureau of Land Management (BLM) officials responsible for oversight of and compliance with the National Environmental Policy Act (NEPA) within their program area and BLM personnel responsible for preparing NEPA documents.

   Appendix 2, Congressionally Exempt Actions, has been reserved. It is scheduled to be issued in FY 1989. Part B of Appendix 3, BLM Categorical Exclusions, and Appendix 6, Major Actions Normally Requiring an EIS, are reserved pending revisions in the Departmental Manual (516 DM 6, Appendix 5).

2. Reports Required: Quarterly and annual reporting requirements are described in Chapter Nine of the Handbook.

3. Material Superseded: None.

4. Filing Instructions: File directly behind Manual Section material.

REMOVE:	INSERT:
None	H-1790-1
	(Total: 78 Sheets)

Robert F Burford

Director

4. Notifying the Public.

a. Determine Need for Public Review of EA and FONSI. The manager responsible for authorizing the action must determine if the EA and FONSI should be made available for public review (usually a 30-day review period) before making a final determination on the action. The primary purpose of a public review is to allow the public an opportunity to comment on the agency's determination that there are no significant impacts associated with the proposed action and, therefore, an EIS is not necessary. A public review of the EA and FONSI is usually only necessary under certain limited circumstances as defined in CEQ requlations (40 CFR 1501.4(e)(2)). Program-specific guidance should also be consulted to determine if the EA and FONSI must be reviewed by the public prior to a decision. The manager must notify the public, including affected State and local governments and Indian tribes, of the review period (40 CFR 1506.6). Generally, notice of the review should be announced in regional and local newspapers or other media. A copy of the EA and FONSI must be provided to individuals and organizations who requested one. Copies should also be provided to individuals and organizations affected by or known to have an interest in the action.

NOTE: An EA should not be labeled as a "draft" when issued for public review.

b. Provide Notice of Availability of EA and FONSI. If a public review is determined unnecessary, the affected and interested public must be notified of the availability of the EA and the FONSI (40 CFR 1501.4(e)(1) and 1506.6). The manager responsible for authorizing the action determines the appropriate means for notifying the public and ensuring availability based on the extent of concern and interest in the action. The manager has a great deal of discretion in determining how to satisfy the notification requirement, however, all individuals or organizations that have requested notification on an individual action must be notified by mail. Managers are also encouraged to maintain a record or register of all EA's and FONSI's completed and make it available for review in the State or District Office public room.

5. Reaching and Recording the Decision. The decision to approve a proposed action resulting in a FONSI may be made after consideration of other factors, as appropriate, and after program-specific requirements have been satisfied. Decisions should be documented in accordance with program-specific requirements, if any. It is recommended, though not required, that the decision record (DR) incorporate the FONSI. (See Paragraph C.3 below for content and format guidance for a combined FONSI and DR.)

(d) Applicable policy or program requirements and standard or routine procedures which will apply should be described or incorporated by reference. These are program requirements and procedures which are not discretionary and would apply to any proposed action or alternative.

(e) If the alternatives considered in the EA have been described in a previous environmental document, it may be sufficient to incorporate by reference the description from the previous document.

(3) Environmental Impacts. The EA must describe and analyze the environmental impacts of the proposed action and each alternative considered. It must also identify and analyze mitigation measures, if any, which may be taken to avoid or reduce environmental harm.

(a) The analysis of impacts must address direct, indirect and cumulative impacts on all affected resources of the human environment, including critical elements (see Appendix 5).

(b) A negative declaration is recommended for critical elements which are not present and/or not affected, e.g., "The following elements have been analyzed and will not be affected: . . ." Consult program-specific guidance for elements which, if not present or affected, require a negative declaration.

(c) If the impacts of alternatives considered have been fully analyzed in a previous environmental analysis, it may be sufficient to incorporate by reference the analysis from the previous document.

(d) Mitigation measures should be specifically described but should not be formulated as formal stipulations in the EA. Attach stipulations to either the decision record or to the authorizing document. The description of mitigation measures must not include measures that are incorporated into the proposed action or an alternative or that are otherwise standard operating procedures or requirements.

(e) The anticipated effectiveness of mitigation measures and any direct, indirect, and cumulative impacts that remain after the application of all mitigation measures, i.e., residual impacts, must be described and analyzed.

(4) Persons or Agencies Consulted. The EA must list persons or agencies contacted or consulted. The brief statement of the purpose and, if applicable, results of contacts and consultations is recommended.

1. Scoping the EIS (40 CFR 1501.7, 1506.6 and 1508.25). The purpose of scoping, generally, is to focus the analysis on significant issues and reasonable alternatives in order to eliminate extraneous discussion and reduce the length of the EIS. Among other things, scoping helps: involve the public and affected agencies early in the process; identify significant issues to be analyzed as well as alternatives and potential impacts to be addressed; and allocate assignments for preparing the document among lead and cooperating agencies. Scoping is not a single, isolated action, but an ongoing process. The following actions or decisions are accomplished during the EIS scoping:

a. Publish Notice of Intent (40 CFR 1508.22, 516 DM 2.3D, Part B, 2.2B). A Notice of Intent (NOI) must be prepared by the lead office and published in the Federal Register as soon as practical after it is determined that an EIS will be prepared. Publication of an NOI formally begins scoping for an EIS. Two purposes of an NOI are: to notify persons or agencies interested in, or affected by, a proposed Federal action; and to seek information and/or participation in scoping. To the extent practical, the NOI should be combined with program-specific notice requirements. (See Paragraph C.1 below for guidance on the content of an NOI.) Also consult Chapter VIII for guidance on publishing notices in the Federal Register.

b. Develop Preparation Plan. The lead office should develop a written preparation plan which sets limits on the analysis and provides a plan to guide the preparation of the EIS. The preparation plan facilitates coordination between participants involved in the preparation of the EIS and those with approval and oversight responsibilities.

(1) There are no Bureau format or content requirements for a preparation plan. In some cases, program-specific guidance has been prepared which provides specific content and format guidance. A preparation plan generally addresses procedural, organizational, public involvement, coordination and consultation, contracting, cost reimbursement, scheduling and other details regarding the preparation of the EIS as discussed below. (See Paragraph C.2 below for guidance on the content and format of a typical preparation plan.)

(2) Information usually found in a preparation plan is sometimes integrated into other formal documents such as memoranda of understanding or contracts. In resource management planning, the preplanning analysis covers material normally addressed in a preparation plan.

(3) The preparation plan should be approved by the manager responsible for authorizing the proposed action. It is recommended that the State Director, or other appropriate manager with oversight responsibilities, also approve preparation plans. In some cases, depending upon the nature of the project or plan, it may be desirable to obtain a broad review of the preparation plan prior to approval.

(4) Any significant changes in EIS preparation plans, especially those which affect the schedule or scope of the EIS, should be approved by the manager responsible for authorizing the proposed action and, if necessary, the State Director or other appropriate manager.

c. Develop Strategy for Public Involvement and Interagency/Intergovernmental Coordination and Consultation. Public involvement and interagency/intergovernmental coordination and consultation are essential to scoping as well as to subsequent phases of the EIS process. A written strategy or plan should be developed for involving the public and for coordinating/consulting with other governmental agencies with interest or expertise in the activities or issues being addressed. The plan should be incorporated into the preparation plan.

(1) Members of the public as well as other agencies or organizations known to be interested in or affected by the proposed action should be identified and put on appropriate mailing lists.

(2) Agencies with special expertise or interest in the subject should be notified in order to alert them of potential consultation and coordination needs and to invite them to be cooperating agencies, if appropriate (see Paragraph B.1.g below). Memoranda of understanding or interagency agreements which provide for coordination and consultation should be adhered to or developed, where appropriate, to help guide such activities.

(3) Schedules for public meetings or hearings, mailings, consultations, and other similar activities involved in the scoping process should be developed (see Paragraph B.3.e below). Also consult program-specific guidance for additional requirements.

(4) The lead office is encouraged to use a variety of methods and mediums for keeping the public meaningfully informed of progress and for obtaining their feedback. It is also necessary to develop mechanisms for tracking and recording public involvement. (See Chapter VIII for guidance on recordkeeping.)

d. Define Proposed Action. Defining the proposed action plan is key to subsequent analysis. It is an ongoing process which usually begins prior to the issuance of the NOI. In the case of a BLM-initiated proposal, the proposed action will usually evolve and change based on the results of public input during scoping and subsequent analysis. Thus, for internal proposals, the identification and definition of the proposed action is generally more tentative in the early stages. In the case of an externally initiated proposal, where the BLM is responding to an applicant's proposal, the proposed action reflects what the applicant is specifically proposing to do and should be clearly defined early in the process. Some important considerations in defining the proposed action are:

g. Identify Cooperating Agencies (40 CFR 1501.5, 1501.6, 1508.5 and 1508.16; 516 DM 1.5). The BLM, as lead agency, is responsible for establishing liaison with all Federal, State, local, and Tribal agencies that have jurisdiction by law or special expertise with respect to any environmental impact involved in a proposed action and for requesting their participation as a cooperating agency on an EIS, as appropriate. The CEQ has identified areas of jurisdiction by law or special expertise for all Federal agencies (see F.R. Vol. 49, No. 247, 12/21/84).

Before proceeding past the scoping process, the BLM official responsible for preparing the EIS should determine if work with any cooperating agencies is covered by an existing memorandum of understanding (MOU) or interagency agreement (IA). If it is, the MOU or IA should be followed or modified as necessary. If it is not, a formal MOU should be developed which identifies the respective responsibilities of the BLM and the cooperating agency in preparing the EIS. General responsibilities for lead and cooperating agencies are set forth in 40 CFR 1501.6 (a) and (b). If disagreements arise over agency assignments or responsibilities which cannot be resolved at the State Director level, the Director (760) should be consulted for assistance in negotiating a settlement or otherwise resolving the problem.

h. Determine Contracting Needs (40 CFR 1506.5(c)). Contracting may be used for the preparation of an EIS or for certain analyses to support preparation of an EIS. Contracting is useful for providing expertise which the BLM lacks, reducing the amount of effort needed for analysis and document preparation by the BLM, and completing the EIS in a shorter period of time.

There are two principal approaches for contracting environmental documents: standard Federal contracting procedures (competitive procurement); and third-party contracting. Procurement of contracts is subject to the Federal Acquisition Regulation (48 CFR 1). Third-party contracting may be used most effectively for non-Bureau energy initiatives (e.g., power plants and certain rights-of-way). The key element in both approaches is BLM control of analytical standards used, of the products produced and of the schedule. (See Appendix 7 for additional guidance on contracting.)

i. Determine Staffing and Budget Needs and Proposed Schedule. Staffing and budget requirements, as well as a detailed schedule for preparing the EIS, are usually settled during scoping and incorporated in the preparation plan. The development of a realistic schedule and budget is extremely important. Sufficient time must be allowed and the budget determined for all activities. Early consideration of timeframes, such as building in adequate time for composing and printing the EIS, will minimize unexpected delays or changes in the schedule.

CRITICAL ELEMENTS OF THE HUMAN ENVIRONMENT

The following elements of the human environment are subject to requirements specified in statute, regulation, or executive order and must be considered in all EA's and EIS's. If the resource or value is not present or is not affected by the proposed action or alternatives, this may be documented in the EA or EIS as a negative declaration. Consult program-specific guidance to determine if a negative declaration is required for certain actions.

Element	Relevant Authority	BLM Manual
Air Quality	The Clean Air Act as amended (42 USC 7401 et seq.)	MS 7300
Areas of Critical Environmental Concern	Federal Land Policy and Management Act of 1976 (43 USC 1701 et seq.)	MS 1617
Cultural Resources	National Historic Preservation Act as amended (16 USC 470)	MS 8100
Farm Lands (prime or unique)	Surface Mining Control and Reclamation Act of 1977 (30 USC 1201 et seq.)	
Floodplains	E.O. 11988, as amended, Floodplain Management, 5/24/77	MS 7260
Native American Religious Concerns	American Indian Religious Freedom Act of 1978 (42 USC 1996)	MS 8100
Threatened or Endangered Species	Endangered Species Act of 1973 as amended (16 USC 1531)	MS 6840
Wastes, Hazardous or Solid	Resource Conservation and Recovery Act of 1976 (42 USC 6901 et seq.) Comprehensive Environmental Response, Compensation, and Liability Act of 1980 as amended (42 USC 9615)	MS 9180 MS 9183
Water Quality Drinking/Ground	Safe Drinking Water Act as amended (42 USC 300f et seq.) Clean Water Act of 1977 (33 USC 1251 et seq.)	MS 7240 MS 9184
Wetlands/Riparian Zones	E.O. 11990, Protection of Wetlands, 5/24/77	MS 6740
Wild and Scenic Rivers	Wild and Scenic Rivers Act as amended (16 USC 1271)	MS 8014
Wilderness	Federal Land Policy and Management Act of 1976 (43 USC 1701 et seq.) Wilderness Act of 1964 (16 USC 1131 et seq.)	MS 8500

Indian Tribes. CEQ requires that agencies request comments of Indian tribes when the effects may be on a reservation. Comments must be requested from the Indian tribe through the tribal governing body, unless the tribal governing body has designated an alternate process (516 DM 4.16B).

Applicant. CEQ requires that agencies request comments from the applicant, if any.

Public. CEQ requires that agencies request comments from the public, including persons or organizations who are interested or affected.

Federal Agencies Who Have Requested Receiving Copies of EIS's. The CEQ requires that agencies request comments of any agency which has requested that it receive statements on actions of the kind proposed, regardless of whether or not the requesting agency has jurisdiction by law or special expertise. Agencies that have requested copies of BLM EIS's are listed below:

Name/Mailing Address	What Documents	# of Copies
INTERIOR AGENCIES		
Bureau of Mines:		
Branch of Mineral Assessment Bureau of Mines MS-5050, Rm. 819 Department of the Interior Washington D.C. 20240	All EIS's	2
Alaska Field Operations Bureau of Mines MS-5050, Rm. 819 Department of the Interior Washington, D.C. 20240	All EIS's in Alaska	1
Western Field Oper. Center Bureau of Mines, MS-5100 E. 363rd Avenue Spokane, Washington 99202	All EIS's in the States of WA, OR, MT, ID, NV CA, HI, GU	1
Intermountain Field Oper. Center Bureau of Mines, MS-5090 P.O. Box 25086, Bldg. 20 Denver Service Center Denver, Colorado 80225	All EIS's in the States of WY, UT, ND, SD, NE, OK, TX, IA, MN, AR, KS, NM, AZ, MO, LA, IL, AL, FL, MS, GA, OH, IN, ME, PA, VT, NY, WV, VA, RI, NJ, TN, DE, TN, WI, KY, MD, NC, SC	1

Form 1221-2
(June 1969)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

MANUAL TRANSMITTAL SHEET

Release
8-38

Date
12/12/88

Subject

8100 - CULTURAL RESOURCE MANAGEMENT

1. Explanation of Material Transmitted: This release completely revises BLM Manual Section 8100.

2. Reports Required: None.

3. Material Superseded: Manual pages superseded by this release are listed under "REMOVE" below. No other directives are superseded.

4. Filing Instructions: File as directed below:

REMOVE	INSERT
All of 8100 (Rel. 8-1)	8100
(Total: 26 sheets)	(Total: 38 sheets)

Dean Stepanek
Assistant Director, Land and
Renewable Resources

I. American Indian Religious Freedom Act of 1978 (P.L. 95-431; 92 Stat. 469; 42 U.S.C. 1996) resolves that it shall be the policy of the United States to protect and preserve for the American Indian, Eskimo, Aleut, and Native Hawaiian the inherent right of freedom to believe, express, and exercise their traditional religions, including but not limited to access to religious sites, use and possession of sacred objects, and freedom to worship through ceremonials and traditional rites. Federal agencies are directed to evaluate their policies and procedures to determine if changes are needed to ensure that such rights and freedoms are not disrupted by agency practices. The act, a specific expression of First Amendment guarantees of religious freedom, is not implemented by regulations. (See Appendix 7.) (Note: A U.S. Court of Appeals has determined that there is a compliance element in the American Indian Religious Freedom Act, requiring that (1) the views of Indian leaders be obtained and considered when a proposed land use might conflict with traditional Indian religious beliefs or practices, and that (2) unnecessary interference with Indian religious practices be avoided during project implementation, but specifying that (3) conflict need not necessarily bar Federal agencies from adopting proposed land uses in the public interest. Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1983).)

J. Archaeological Resources Protection Act of 1979 (P.L. 96-95; 93 Stat. 721; 16 U.S.C. 470aa et seq.) as amended (P.L. 100-555; P.L. 100-588) provides felony-level penalties, more severe than those of the American Antiquities Act of 1906 (see .03A), for the unauthorized excavation, removal, damage, alteration, defacement, or the attempted unauthorized removal, damage, alteration, or defacement of any archaeological resource, more than 100 years of age, found on public lands or Indian lands. The act also prohibits the sale, purchase, exchange, transportation, receipt, or offering of any archaeological resource obtained from public lands or Indian lands in violation of any Federal law. No distinction is made regarding National Register eligibility. The act establishes definitions, permit requirements, and criminal and civil penalties, among other provisions, to correct legal gaps and deficiencies in the Antiquities Act (see .03A). The act overlaps with and partially supersedes the Antiquities Act. It is implemented by uniform regulations and departmental regulations, both at 43 CFR Part 7. (See Appendix 8.)

2. traditional lifeway value: the quality of being useful in or important to the maintenance of a specified social and/or cultural group's traditional systems of (a) religious belief, (b) cultural practice, or (c) social interaction, not closely identified with definite locations. Another group's shared values are abstract, nonmaterial, ascribed ideas that one cannot know about without being told. Traditional lifeway values are taken into account through public participation during planning and environmental analysis.

(Note on usage: Whenever the term "cultural resource" is used in BLM, it should be understood to apply to either a cultural property or a traditional lifeway value. When one of the specific terms is used, it should be understood that the other is purposely excluded.)

cultural resource inventory classes:

1. class I - existing data inventory: a professionally prepared study of existing cultural resource data from published and unpublished documents, BLM cultural resource inventory records, institutional site files, State and National registers, informant interviews, and other information sources. Products of the study are a compilation and analysis of all reasonably available data and a comprehensive synthesis of the data. Class I inventories, which should have prehistoric, historic, and ethnological/sociological elements, are in large part chronicles of past land uses, and as such they may have major relevance to current land use decisions. They are periodically updated, in both the compilation and the synthesis, to incorporate new data from class II and class III inventories, histories, oral testimony, and other sources.

2. class II - sampling field inventory: a professionally conducted, statistically based sample survey, designed to aid in characterizing the probable density, diversity, and distribution of cultural properties within a large area through interpretation of the results of intensive survey conducted in limited and discontinuous portions of the target area. Within individual sample units, survey aims, methods, and intensity are the same as those applied in class III inventory (see 3. below). Class II inventory may be conducted in several phases utilizing differing sample designs to improve statistical reliability. (Compare "reconnaissance survey.")

D. Sociocultural Use. This category is to be applied to any cultural resource that is perceived by a specified social and/or cultural group as having attributes that contribute to maintaining the heritage or existence of that group. This use category signifies that the cultural resource is to be managed in a way that takes those attributes into account, as applicable.

E. Public Use. This category may be applied to any cultural property found to be appropriate for consideration as an interpretive exhibit in place, a subject of supervised participation in scientific or historical study, or related educational and recreational uses by members of the general public.

F. Discharged use. Assignment to this category means either that a cultural resource that was previously qualified for assignment to any of the categories defined above no longer possesses the qualifying characteristics for that use or for assignment to an alternative use; or that a cultural property's scientific use potential was so slight that it was exhausted at the time the property was recorded, and no alternative use is deemed appropriate. Where a cultural property is involved, allocation to discharged use also means that records pertaining to the property represent its only remaining importance, and that its location no longer presents a management constraint for competing land uses. Considerations include the following:

1. Applies to Cultural Property or Traditional Lifeway Value. Assigned use of either a cultural property or a traditional lifeway value may be discharged when appropriate, but in the case of a traditional lifeway value assigned to sociocultural use, it would be uncommon for ascribed importance (for example, sacredness) to be lost.

2. Applies When Qualifying Characteristics Absent. A cultural property such as a shallow rockshelter could be fully excavated, thereby realizing its scientific use potential, or it could be completely looted, destroying its potential. Knowledge that it once contained archaeological deposits is still important, and it would continue to be represented in inventory records.

3. Applies to Immediate Realization of Potential. A cultural property with limited scientific use potential and no other use potential, such as a small surface lithic scatter, could be sufficiently recorded on discovery so that no further field study would be needed.

1. Sociocultural use. (See Manual Section 8111.21D.) Discuss classes of cultural properties and any individual cultural property, and any traditional lifeway value identified by a social and/or cultural group as important to the group's well-being, in terms of their nature, specific attributes important to the group, kind and degree of importance, and susceptibility to conflict. As appropriate, key the discussion to provisions of the American Indian Religious Freedom Act (i.e., matters of access, use and possession of sacred objects, freedom to worship through traditional ceremonials and rites) and Section 4(c) of the Archaeological Resources Protection Act (i.e., notification to Indian tribes of potential harm to or destruction of locations, considered to have religious or cultural importance, as a consequence of issuing a permit that authorizes excavation or removal of archaeological resources).

2. Public use. (See Manual Section 8111.21E.) Discuss classes of cultural properties and any individual cultural properties determined appropriate for use that would satisfy a defined need for educational, recreational, or other public use. Also discuss the effects of allocation to this use, including compatibility with or constraints on other cultural resource uses, and the general steps that may be necessary before public use can be accommodated.

C. Management for Conservation is the heading for the third division of this section (if used). Again, state the rationale that led to inclusion of cultural resources under this objective in the RMP, along with any additional discussion needed to make its basis clear. Only one use category, conservation for future use, comes under this objective (see Manual Section 8111.21B). Identify and describe fully, in terms of their overriding scientific, historical, or other importance, any classes of cultural properties that are to be maintained in their present condition and withheld from any use, including scientific use, that would change their present condition. Discuss any individual properties identified under this heading according to the following guidelines:

1. If a cultural property's importance lies in its outstanding research potential, include in its description detailed discussion of the kinds of data the property apparently contains, the property's apparent value for the pursuit of specified research topics, and the exact, technical reasons for withholding it from scientific use at this time. Specify, as clearly as possible, precisely what methodological, technological, or other conditions need to be met before the property will be released from its conservation status and made available for scientific use. I.e., what has to happen before the property would be given over to research? Why would we not accept a good research proposal right now? How will we be able to determine in the future that the release conditions have been met?

.3 Compliance and Coordination.

.31 Environmental Assessment. No environmental document should be necessary for a CRMP that adheres to determinations made in the RMP and analyzed in the EIS. If required by the nature of projects, prepare EA's prior to implementing a CRPP (see Manual Section 8132.12A).

.32 Native American Coordination. Similarly, no Native American coordination should be necessary at this intermediate level in planning, provided that appropriate Native American coordination was included as part of the public involvement process for the RMP/EIS. Conduct detailed coordination, as needed, in connection with project plan preparation (see Manual Section 8132.12B).

.33 Compliance with Section 106. Decisions made in a CRMP are generally not subject to section 106 compliance except for those decisions allocating cultural properties to discharged use. Such properties must be determined not to be eligible for the National Register of Historic Places, in consultation with the State Historic Preservation Officer, prior to plan approval. The section 106 process for the CRMP will end with the SHPO's concurrence on noneligibility. For all other CRMP decisions, section 106 compliance will be deferred until CRPP preparation.

C. Appendices.

1. Maps. Include maps, overlays, or attachments integral to the plan in an appendix. Date and initial all maps and overlays, and clearly identify any cultural properties affected by the plan.

2. Supporting Data. Include detailed information and documentation needed for the permanent project record in an appendix (e.g., forms, data summaries, evaluation summaries, and related records not already included in the CRMP). Also reference or summarize any relevant State or local cultural resource plans and professional reports dealing with the project area.

3. Specific Locational Information. Delete legal descriptions and maps from CRPP's before they are made available for public review or inspection if there is sufficient reason to expect that disclosure of location would lead to a cultural property's unauthorized disturbance (see National Historic Preservation Act, sec. 304, Manual Section 8100, Appendix 5; Archaeological Resources Protection Act, sec. 9, Manual Section 8100, Appendix 8; and Manual Section 8111.06C and .06D).

.12 Compliance and Coordination.

A. Environmental Assessment. As appropriate to the nature of work to be done, prepare an EA or other documentation of environmental consideration (including categorical exclusion) prior to approving and implementing each CRPP. An EA, if needed, must assess the environmental impacts of all actions planned in the CRPP. If any actions proposed in the CRPP would impact other resources or programs, interdisciplinary team input may be necessary.

B. Native American Coordination.

1. Public Participation. If any social and/or cultural group attributes religious or cultural importance to a cultural property involved in the project plan, and if the proposed management action was not considered as part of the public participation for the RMP/EIS or under .12B2 below, provide the group an opportunity to participate prior to plan approval, during preparation of the CRPP EA.

8151 - CULTURAL RESOURCE USE PERMITS

.01 Purpose. The permitting system described in this Manual Section is designed to facilitate appropriate scientific use of cultural properties on public lands. This Manual Section establishes the process to be followed by Field Offices for receiving and reviewing permit applications and requests for fieldwork authorizations; for issuing and monitoring permits and fieldwork authorizations; and for controlling and maintaining associated records.

.02 Objectives. Objectives of the permitting element of the program's utilization component are to provide timely response to applicants; to ensure that legal and regulatory requirements are met; and to establish the procedural basis for uniform treatment of applications and permits among affected Field Offices.

.03 Authority. (See Manual Section 8150.03.)

.04 Responsibility. (See also Manual Section 8100.04.)

A. State Directors, through or with the assistance of the appropriate Deputy State Director(s) as assigned, are responsible for receiving permit applications; for preparing permanent files; for conducting technical and management reviews to ensure that all qualifying requirements are met; for issuing or denying, modifying, suspending, and revoking permits; and for maintaining complete and current files. Authority to issue, deny, modify, suspend, or revoke permits, and to issue warnings to permittees, may be delegated to an appropriate official within the State Office, at the State Director's discretion, but may not be redelegated further.

B. District Managers and Area Managers are responsible for conducting technical and management reviews of permit applications as requested by the State Director; for making recommendations to the State Director concerning permit issuance, denial, modification, warning, suspension, and revocation; for receiving requests to authorize field work proposed under the authority of a permit; for issuing (District Manager or Area Manager) or denying (District Manager only) such fieldwork authorizations; for notifying and consulting with affected Indian tribes; and for monitoring work conducted under permits and fieldwork authorizations.

C. Cultural Resource Specialists on State, District, and Area staffs are responsible, within the limits of their professional qualifications, for providing and documenting technical reviews and recommendations; for developing terms and conditions; and for monitoring and documenting permittees' technical performance and compliance with permit terms and conditions.

1. Proposed work may be modified through limitations or terms and conditions, or applications may be denied, if the application proposes work incompatible with:

a. Cultural resource use categories established through evaluation and planning. For example, if an applicant proposes to train university field school students in excavation techniques in a cultural property that has been allocated to conservation for future use because of scarcity and overriding scientific importance, a similar property that has been allocated to scientific use should be substituted (after consultation with the applicant), or the application should be denied. (See Manual Sections 8111.2 and 8131.22.)

b. Multiple use resource protection requirements pertaining to time of year, type of activity, type of equipment employed, access, personal safety, fire safety, or other management restrictions. For example, if an applicant proposes to do testing in a bighorn sheep lambing area during lambing season, or to use motorized equipment in a wilderness study area, the proposed timing or method of use should be changed through terms and conditions (after consultation with the applicant) or the application should be denied.

c. Other authorized uses of lands or resources that are exclusive in nature.

2. When the application is of a general nature, at a scope above the level of specific projects, so that potential conflicts cannot be identified, this review step may be limited or deferred until a request for fieldwork authorization is submitted pursuant to .14.

G. Indian Tribal Religious or Cultural Concerns. All applications for survey and limited testing permits and for excavation and/or removal permits must be reviewed for potential harmful or destructive effects on sites or areas of religious or cultural importance to Indian tribes. In addition, applications for noncollection survey/recordation permits may be so reviewed if there are reasons to think, because of an area's previously identified sensitivity, that even such nonimpacting use should be made known to Indian tribes. If it is determined that potential conflicts exist, the notification procedures in .2 below must be followed prior to making a decision to approve the application. Indian tribal religious or cultural concerns may be the basis for modification of the proposed work through limitations or terms and conditions, or for denial of the application. When the application is of a general nature, at a scope above the level of specific projects, so that potential conflicts cannot be identified, this review step may be limited or deferred until a request for fieldwork authorization is submitted pursuant to .14 below.

.2 Notification to Indian Tribes of Possible Harm to, or Destruction of, Sites on Public Lands Having Religious or Cultural Importance. District Managers shall have the principal role in notifying and consulting with Indian tribes when work proposed in an application for a permit or a request for fieldwork authorization might have a harmful or destructive effect on sites or areas that have tribal religious or cultural importance (see "site of religious or cultural importance," Glossary of Terms). In general, only permits and fieldwork authorizations for survey and limited testing and for excavation and/or removal are expected to be subject to notification requirements (see .12G above and .23B1 below). The term "Indian tribe" includes Alaska Native Villages and Native Corporations defined in or established by the Alaska Native Claims Settlement Act.

.21 Identification of Indian Tribes.

A. Statewide Listing. Each State Director shall be responsible for developing and distributing to District Offices a list of federally recognized Indian tribes residing within the area of the State Director's administrative jurisdiction. The list shall be based on the Bureau of Indian Affairs' list of recognized Indian tribes published annually in the *Federal Register*, and shall be updated as necessary.

B. Aboriginal or Historic Ties. Each District Manager shall be responsible for identifying Indian tribes with aboriginal or historic ties to lands under his or her administrative jurisdiction, regardless of the tribe's place of residence. For each such tribe, the District Manager shall identify the chief executive officer and/or designee who shall serve as the principal contact for notification and/or consultation under .23 and .24 below. A list of such tribal contacts shall be uniformly employed for notification purposes.

C. Nonrecognized Indian Groups. Each District Manager shall be responsible for compiling a list of all groups, residing or having religious or cultural interests within his or her area of administrative jurisdiction, that have petitioned the Bureau of Indian Affairs for Federal recognition as Indian tribes.

.22 Identification of Concerns.

A. Conference. Each District Manager shall confer with Indian tribes or groups identified as having religious or cultural concerns within his or her area of jurisdiction, for the purpose of learning the nature and location of sites and areas for which the tribes or groups have such concerns, and for determining the circumstances under which notification is desired.

B. Agreements. District Managers may negotiate agreements with Indian tribes or groups identified as having religious or cultural concerns within their areas of jurisdiction, to formalize the results of conferences under .22A above. Such agreements should be designed to eliminate unneeded notification and to ensure that necessary notification will be provided.

C. Confidentiality of Information. File information pertaining to the nature and location of sites or areas that are of concern to Indian tribes or groups for religious or cultural reasons shall be protected from public disclosure to the extent allowed by statute. Sites or areas that are or coincide in location with a cultural property eligible for or included in the National Register of Historic Places, or that are or coincide with archaeological resources as defined in ARPA and 43 CFR 7.3, shall be protected from disclosure under a Freedom of Information Act request (16 U.S.C. 470w-3; 16 U.S.C. 470hh).

.23 Notification Requirement and Content.

A. When Notification Is Required. Upon receiving an application for permit or a request for fieldwork authorization that could, if approved, result in harm to or destruction of identified sites or areas of Indian tribal religious or cultural concern, the District Manager shall notify the Indian tribe(s) known to have the concerns. Notification shall be by mail, return receipt requested.

B. When Notification Is Not Required. Notification shall not be required when one or more of the following conditions applies:

1. The proposed activity will not result in surface disturbance (except as provided in .12G above).

2. Diligent attempts to identify Indian tribes with aboriginal or historic ties have had a negative conclusion.

3. Information obtained pursuant to .22 above indicates that notification is not necessary under the circumstances of the proposed work.

4. Information sought pursuant to .22A above was withheld by the Indian tribe or group, and the District Manager has informed the tribe or group in writing that the absence of information will preclude notification.

C. Content of Notification. (See Illustration 1.) Any notification shall include, at a minimum, the following information:

1. Location and nature of proposed work.

2. Identification of anticipated harmful or destructive effects, to specific known sites or areas of religious or cultural importance, that the District Manager has determined might result from the proposed work.

3. Statement that any request for consultation with the District Manager must be received within 30 days from date of receipt of the notification (beginning as of the date of delivery shown on the return receipt).

4. Citation of ARPA Section 4(c) and 43 CFR 7.7(a) as the basis for notification.

.24 Consultation.

A. Request by Indian Tribe. When in response to notification an Indian tribe requests a consultation with the District Manager, the District Manager shall schedule a meeting with the chief executive officer and/or designated tribal official(s) so that the consultation can be accomplished within 15 days of receipt of the request.

B. Scope of Consultation. Consultation topics shall be limited to the specific location(s) and nature of religious or cultural concerns of the Indian tribe(s), and should focus on the need for and the possible means for avoidance or mitigation of potential harm or destruction to the sites or areas of concern.

C. Presiding Officer. The District Manager or an authorized representative shall function as the presiding officer during consultation.

D. Tribal Representation. The concerned Indian tribe shall be represented by specified tribal officials. A written outline of topics, prepared by the Indian tribe prior to the consultation, shall serve as the basis for the meeting agenda. The presiding officer shall prepare the agenda.

E. Closed Meeting. Consultation shall not be considered or treated as a public meeting.

F. Confidentiality. Information provided by the Indian tribe shall be protected from public disclosure to the extent allowed by statute (see .22C above).

G. Documentation. The presiding officer shall insure that proper documentation is prepared, to be maintained in the permanent file as a record of the consultation and to serve as the basis for recommendations and decision.

.25 Decision. Following consultation, further processing of the application or request follows from .12H1 or .14B3 above, as appropriate. The District Manager's recommendation with regard to a permit, or decision with regard to a fieldwork authorization, shall take into account concerns expressed by the Indian tribe. The District Manager may recommend or decide (as appropriate) as follows:

A. Recommend permit approval, or issue fieldwork authorization, without stipulating additional avoidance or mitigating measures.

B. Recommend permit approval, or issue fieldwork authorization, stipulating avoidance or mitigation measures adopted as a result of the consultation.

C. Recommend changes in work proposed in a permit application, or change work proposed in a request for fieldwork authorization (after consulting with the permittee).

D. Recommend permit denial, or deny request for fieldwork authorization.

Glossary of Terms

[Note: The following terms are defined as they apply to this Manual Section. Other definitions may be found in BLM Manual Section 8100.]

- C -

cultural resource: any cultural property, including records and physical remains related to such property, and any traditional lifeway value, as herein defined:

1. cultural property: a definite location of past human activity, occupation, or use identifiable through field inventory (survey), historical documentation, or oral evidence. The term includes archaeological, historic, or architectural sites, structures, or places, and may include definite locations (sites or places) of traditional cultural or religious importance to specified social and/or cultural groups. Cultural properties are concrete, material places and things that are managed, in part, through cultural resource use permits issued pursuant to this Manual Section.

2. traditional lifeway value: the quality of being useful in or important to the maintenance of a specified social and/or cultural group's traditional systems of religious belief, cultural practice, or social interaction, not closely identified with definite locations. Traditional lifeway values may appropriately be taken into account through the notification and consultation process described in this Manual Section, but uses associated with them are generally allowed without permission or are permitted as special land uses, not as cultural resource uses subject to the procedures in this Manual Section.

cultural resource use permit: a land use authorization issued pursuant to this Manual Section to a qualified applicant for the purpose of carrying out various identification and/or data recovery operations on cultural properties, located on lands the surface of which is under BLM administrative control or jurisdiction. Such permits are nonexclusive, noncompetitive, minimum impact permits, and are not subject to Notice of Realty Action, filing fees, or cost reimbursement (compare Manual Section 2920).

- P -

person: "any individual, corporation, partnership, trust, institution, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the United States, or of any Indian tribe, or of any State or political subdivision thereof" (quoted from 43 CFR 7.3(g)). Although any "person" may apply for a permit, applicants and permittees are generally organizations rather than individuals (see .06B, .06C, and .12B1).

- S -

site of religious or cultural importance: any location identified by an Indian tribe or group as having such importance; the location might be either a cultural property, closely associated with a definite location, or a less definitely located traditional lifeway value. Note that the word "site" as used in section 7 of the Archaeological Resources Protection Act has a broad, general meaning and is not synonymous with "archaeological site," although an archaeological site may be, or may coincide in location with, a site of religious or cultural importance.

- V -

violation: any chargeable offense against prohibitions in Section 6 or Section 7 of the Archaeological Resources Protection Act (16 U.S.C. 470ee and ff) or in 43 CFR 7.4, punishable by criminal or civil penalties. This is a harsh and threatening term, certain to generate a defensive reaction, that implies flagrant, aggressive, and injurious disregard of the law. It should not be applied to a permittee's failure to meet technical conditions of a permit unless one (or more) of the cited statutory and/or regulatory prohibitions has been breached, the permit has been suspended for cause, and criminal or civil remedy is being pursued. (See .61 and .62 above.)

Sample Notification Letter

8151.2 [ofc]
[apln/request #]

[Date]

[Tribal chairperson or designated tribal official]
[Indian tribe]
[Address]

[Salutation]

The Bureau of Land Management has received an application requesting authorization to conduct archaeological investigations [in/at specified location]. The area includes [description of limits of proposed permit area]. A map is enclosed for your reference.

We have determined that the archaeological work, if authorized, might have a harmful effect on [specify known site/location], which we understand is considered by your tribe to be of religious [or cultural] importance.

This letter is to notify you of our determination, made in accordance with Section 4(c) of the Archaeological Resources Protection Act (16 U.S.C. 470cc) and Section 43 CFR 7.7(a) of the regulations that implement the Act. Under provisions of Section 43 CFR 7.7(b), the chief executive officer or designated tribal official may request a consultation with the District Manager within 30 days of receipt of this notice.

If we have not received a response from your tribe within 30 days, we will continue processing the application. Please contact [name] at the address shown above, or at [telephone number], if you have any questions.

Sincerely,

[District Manager]

1 Enclosure
    Encl. 1 - Map [showing limits of proposed permit area]